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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 246

FREDERICK S. DEITRICK, RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK, PETITIONER,

vs.

THOMAS E. GREANEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JULY 29, 1939.

CERTIORARI GRANTED OCTOBER 9, 1939.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1938.

No. 3415.

THOMAS E. GREANEY,

DEFENDANT, APPELLANT,

v.

FREDERICK S. DEITRICK, Receiver,

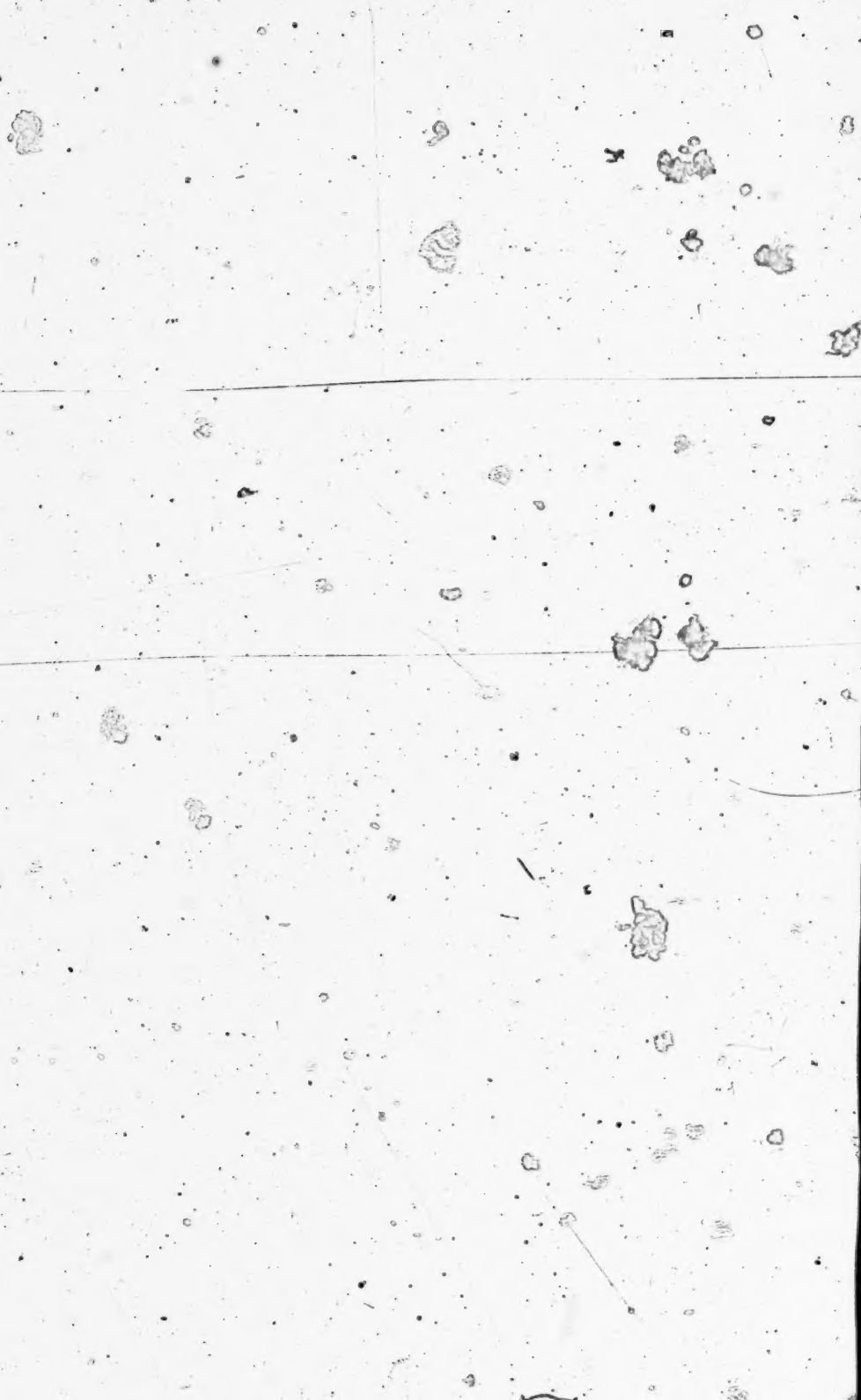
PLAINTIFF, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSESTS, FROM FINAL DECREE (SWEENEY, J.), JUNE 30, 1938.

TRANSCRIPT OF RECORD.

DAVID STONEMAN,
EMANUEL KURLAND,
DANIEL J. GALLAGHER,
for Appellant.

ANDREW J. ALDRIDGE,
BRENTON K. FISK,
for Appellee.



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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1938.

No. 3415.

THOMAS E. GREANEY,
DEFENDANT, APPELLANT,

v.

FREDERICK S. DEITRICK, RECEIVER,
PLAINTIFF, APPELLEE.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 4111, EQUITY DOCKET.

FREDERICK S. DEITRICK, RECEIVER BOSTON-CONTINENTAL NATIONAL BANK, PLAINTIFF,

v.

THOMAS E. GREANEY, NIMON KARNOW AND R. D. MAHONEY, DEFENDANTS.

The bill of complaint in this cause was filed in the clerk's office on the eleventh day of March, A. D. 1935, and was duly entered at the December Term of this court, A. D. 1934.

This cause was thence continued to the March Term, A. D. 1935, when, to wit, April 9, 1935, an answer was filed by R. D. Mahoney.

Also at the same term, to wit, April 23, 1935, an answer was filed by Nimon Karnow.

Also at the same term, to wit, June 8, 1935, a motion to amend the bill of complaint was filed by consent and allowed by the court, the Bill of Complaint as Amended being in the words and figures following:

BILL OF COMPLAINT AS AMENDED.

[Filed March 11 ,1935; amended June 8, 1935.]

To the Honorable Judges of the United States District Court for the District of Massachusetts:

Frederick S. Deitrick, the plaintiff above named, is a citizen of Massachusetts, residing in Middlesex County in said Commonwealth. The defendants, Thomas E. Greaney, Nimon Karnow and R. D. Mahoney, are each and all citizens of Massachusetts, said Greaney and Karnow reside in Suffolk County, and said Mahoney in Middlesex County, in said Commonwealth.

The plaintiff is receiver of Boston-Continental National Bank, a national banking association, under due appointment of the Comptroller of the Currency of the United States, and in such capacity prosecutes this action, the jurisdiction being based upon Section 24 of the United States Judicial Code.

1. On or about June 30, 1930, the defendant Thomas E. Greaney, who was a director of Boston National Bank, and the defendant Nimon Karnow, acquired from the said bank 190 shares of its own issued and outstanding capital stock which the bank had illegally acquired. Of these shares, 114 had been recorded and stood on the bank's stock register in the name of Reed and Company, 10 in the name of Bright Sears and Company, and 66 in the name of Ada Albert. Ostensible payment for these shares was made by or for the said two defendants out of funds of the bank itself, in the manner hereinafter stated.

2. Said ostensible payment was made by the bank's advancing to defendant Karnow, on a note for $23,500, signed Karnow Bros., the amount of $23,203.14, which amount was thereupon placed on deposit in National Shawmut Bank of Boston to the credit of defendant Greaney, who had previously given the Boston National Bank his own check upon the Shawmut Bank for the said amount, $23,203.14. The shares were thereupon transferred on the bank's records out of the names of Reed and Company, Bright Sears and Company and Ada Albert, into the name of defendant Greaney as the reputed owner of record thereof.

3. On or about October 17, 1930, these shares were changed from the name of defendant Greaney into the name of defendant Nimon Karnow, on the bank's records, as apparent owner thereof, and later, about December 26, 1930, as a result of due consolidation of Boston National Bank and Continental National Bank, under the name Boston-Continental National Bank, they became converted into 684 shares in said consolidated bank, having a par value of $20 each.

4. Thereafter, on or about March 3, 1931, the defendant Karnow caused certificates for 226.8 shares out of said 684 to be issued to Joseph Balter, and thereupon a credit of $9,500, being apparently proceeds out of a sale of said shares to Balter, was applied as a credit on the aforementioned note, reducing the note to $14,366.32.

5. On or about May 4, 1931, defendant Greaney gave Boston-Continental National Bank a note for $14,553,66 for which, after discount, he received from the bank a credit of $14,481.25, which credit was thereupon transferred to the account of Karnow Bros. in ostensible payment of their said note. A renewal note was given by Greaney to the bank in exchange for the original note, and, in turn, successive renewal notes have been given by him to the bank for preceding renewal notes, all substantially like the said original note. A full, true and correct copy of the last such note, being held by the bank, is hereto attached, marked "A". The unpaid principal amount of said note, $14,553.66, together with interest thereon, is due the plaintiff, the credits endorsed thereon being erroneous and not properly allowable.

6. About two days later, on or about May 6, 1931, defendant Karnow caused ceritficates for 457.2 shares, being the remainder of said 684 shares of the stock of said consolidated bank, to be issued to defendant R. D. Mahoney. According to the plaintiff's information and belief, said Mahoney is a son-in-law of defendant Greaney and the transfer to him was made in order to defeat liability of Greaney and Karnow for stock assessments in respect to the shares placed in his name.

7. On or about December 22, 1931, the Comptroller of the Currency of the United States, being duly satisfied that Boston-Continental National Bank was insolvent, appointed a receiver, who

forthwith took charge of all its properties and affairs. Thereafter, on or about July 11, 1932, the Comptroller duly assessed all owners of shares in the bank an amount equal to the par value of their shares, and due demand was made for payment thereof. A full, true and correct copy of the order making the assessment is hereto annexed, marked "B".

8. The amount of $13,680 with interest is due the plaintiff, and wholly unpaid, on account of the assessment upon the 684 shares of stock of Boston-Continental National Bank hereinafore mentioned.

Wherefore the plaintiff prays for relief as follows:

1. That the transfer of 457.2 shares of the stock of Boston-Continental National Bank from Nimon Karnow to R. D. Mahoney be adjudged null and void.

2. That defendants Thomas E. Greaney and Nimon Karnow be adjudged owners of said shares and that they and said R. D. Mahoney and each of them, be ordered to pay the plaintiff the amount of $9,144, with interest from August 18, 1932, as the assessment levied by the Comptroller of the Currency thereon.

3. That the defendants Thomas E. Greaney and Nimon Karnow and each of them, be further ordered to pay the further and additional amount of $14,553.66 with interest, being the amount of the obligation shown by the promissory note made by said Greaney, a copy of which is hereto annexed and marked "A", as aforestated.

BRENTON K. FISK,
Attorney for Plaintiff.

BRENTON K. FISK,
ALDRIDGE & FISK,
Attorneys for the Plaintiff,
44 School Street, Boston.

A

10903.66 1025-G
$14553.66/100 Boston, Mass. Nov. 3, 1931

Sixty days after date I promise to pay to the order of the
Boston-Continental National Bank
the sum of Fourteen Thousand Five Hundred Fifty Three 66/100

Dollars Payable at the Boston-Continental National Bank, together with all charges for the enforcement and collection hereof, waiving all benefits of whatever kind or nature that any Laws give or intends to give for the advantage or protection of the maker hereof.

Value received Thomas E. Greaney
123 Address 91 Essex St., Boston
No. 35 Date Jan. 4, 1932

Endorsements on back of note

Each endorser hereon specifically waives presentment demand and notice and waives all benefits of whatever kind or nature that any laws give or intend to give for the advantage or protection of the endorsers hereon.

Pd.	500.00	3/16/32	Pd.	50.00	5/29/33
	250.00	4/21/32		100.00	6/21/33
	500.00	5/13/32		100.00	7/14/33
	500.00	7/15/32		50.00	8/ 5/33
	100.00	10/ 3/32		100.00	8/22/33
	100.00	10/26/32		100.00	9/12/33
	100.00	12/14/32		100.00	9/28/33
	100 00	1/ 6/33		100.00	11/10/33
	100 00	1/30/33		100.00	11/29/33
	50.00	2/10/33		100.00	1/ 5/34
	50.00	2/21/33		50.00	1/16/34
	100.00	4/26/33		100.00	1/29/34
	100.00	5/12/33		50.00	2/10/34

B.

Office of Receiver BOSTON-CONTINENTAL NATIONAL BANK
Boston, Massachusetts

Boston, Massachusetts, July 11, 1932

You Will Please Take Notice, That the Comptroller of the Currency has, on July 11, 1932, levied an assessment upon the shareholders of Boston-Continental National Bank, Boston, Mass., of the par value of each and every share, payable at the office of the Receiver, on or before August 18, 1932.

The Receiver is, however, authorized by the Comptroller to grant an extension, without interest to shareholders who pay 25 per centum of the assessment on or before that date, and Who Will Give a Written Obligation Satisfactorily Guaranteed, to pay 25 per centum additional on or before September 18, 1932; 25 per centum additional on or before October 18, 1932, and the remaining 25 per centum on or before November 18, 1932.

Deferred Payments will bear interest after August 18, 1932, at the legal rate in the State of Massachusetts, except that interest may be abated in the case of any shareholder who pays one-fourth of his assessment on or before August 18, 1932, and who pays the remaining installments on or before the dates at which they mature under the terms of this extension.

You are therefore required to pay the assessment on the shares of stock standing in your name in accordance with the foregoing order and this notice. Your prompt compliance will be of great benefit to creditors of this trust and advance materially its early liquidation.

JOHN B. CUNNINGHAM, Receiver

$..... Boston-Continental National Bank

To..... Boston, Mass.

On the said eighth day of June, A. D. 1935, the following Stipulation was filed:

STIPULATION.

[Filed June 8, 1935.]

It is hereby stipulated and agreed by and between the plaintiff and the defendants in the above-entitled cause as follows:

1. The credits heretofore allowed upon the note shown as Exhibit A of the bill amounting to $3,650 shall be removed therefrom and transferred to, and allowed against, the note shown as Exhibit C thereof, with the same effect as if the said credits had originally been allowed upon the last mentioned, rather than the former, of said notes. It is admitted and agreed that there are no credits duly allowed against the note shown as Exhibit A, and that the credits

declared in respect thereto are erroneous and shall be wholly disregarded.

2. The defendant Greaney confirms, and expressly agrees to discharge fully, according to the purport thereof, the obligations evidenced by the notes shown as Exhibits C and D of the bill, subject to the credit of $3,650, aforementioned, and to such further credits as the plaintiff's records may duly show him entitled to have thereon.

3. Subject to the court's approval, the bill shall be amended in such a manner as to abandon further proceedings in the present action with respect to the obligations shown in said Exhibits C and D, but wholly without prejudice to the plaintiff either in respect to separate actions upon said obligations or in respect to the remaining issues of the present cause.

4. Furthermore, subject to the court's approval, the answers of defendants Karnow and Mahoney, which have heretofore been filed, shall be treated in all respects as answers made to the bill as amended.

BRENTON K. FISK,
Attorney for Plaintiff.

LOUIS G. STONE,
Attorney for NIMON KARNOW.

JAS. I. YOFFA,
Attorney for the Defendants,
GREANEY & MAHONEY.

At the same term, to wit, June 20, 1935, the following Answer of the Defendant Thomas E. Greaney to the Bill of Complaint as Amended was filed by leave of court:

ANSWER OF THE DEFENDANT THOMAS E. GREANEY TO THE BILL OF COMPLAINT AS AMENDED.

[Filed June 20, 1935.]

(1) The defendant Greaney admits that on June 30, 1930 he was a director in the Boston National Bank. He denies that he or the defendant Nimon Karnow acquired as owners from the bank 190 shares which the bank had illegally acquired. He is ignorant as to in whose name or names the stock stood, and therefore can neither

admit nor deny the allegations made in said paragraph. The defendant Greaney denies that payment ostensible or otherwise for the above shares was ever made by him.

(2) The defendant admits that Karnow caused to be executed a note in the sum of $23,500, and that the bank advanced thereon $23,203.14, and that the said sum was deposited to the account of the defendant Greaney, and that he simultaneously checked out the said amount in favor of the Boston National Bank.

The defendant further says that at his request based upon the request made by the responsible officers of the bank, said Karnow caused the said note to be executed as an accommodation for the bank, and that it was so understood by the officers of the bank.

The defendant has no present memory as to whether the stock ever stood in his own name, and therefore can neither admit nor deny the said allegation, but says further that if the stock ever stood in his name, it was for the convenience of the bank and of Karnow in that the bank retained ownership of the said stock and for indemnification of Karnow, in case he ever was called upon to pay the said note.

(3) As far as the defendant can determine the shares were finally, at the request of Karnow, transferred to him, and converted into Boston Continental National Bank stock, but is ignorant of the date of said transfer or conversion, and therefore can neither admit nor deny the same.

(4) The defendant admits the allegations contained in paragraph 4, but says further that Charles Ulin, president of the Boston National Bank, some time prior to March 3, 1931, turned over to your defendant notes amounting to $24,000, executed by one Balter and one Ragan, to be held as further security for the benefit of the said maker of the note.

(5) The defendant admits that on May 4, 1931, he gave his note in substitution for the Karnow note, at the request of Karnow, and with the consent of said bank, and further admits that no payment has been made by him on the principal of said note.

(6) The defendant denies that Karnow caused the said certificates to be issued to R. D. Mahoney, but says that the bank officials and he agreed that the certificates be held in the name of R. D. Mahoney for

the benefit of the bank and for the protection of the defendant, against being liable for the said note. The defendant denies that said transfer was made to defeat liability for stock assessment.

(7) The defendant admits the allegations in paragraph 7.

(8) The defendant can neither admit nor deny the allegation in paragraph 8, as he is ignorant of the facts contained therein.

(9) And further answering the defendant says that said note of Karnow dated June 30, 1930, and the defendant's note in the sum of $14,533.66, [*sic*] which arose therefrom, were given purely as an accommodation for the bank, at the request of the president of the Boston National Bank, Charles Ulin, under the following circumstances: The bank, so Mr. Ulin stated, had acquired certain shares of stock of its own issue which for some time it had carried as a cash item, and that it was imperative that someone in the wholesale district loan to the bank his note for the purpose of clearing up said item as a matter of bookkeeping, and to hold the said stock as security against any liability whatsoever; that Mr. Ulin had tried to get someone to do so, but had not succeeded. The defendant Greaney induced the defendant Karnow to do this for the bank, and accordingly on June 28, 1930 he executed his note in the sum of $23,500, and the proceeds therefrom were deposited by him to the defendant Greaney's account in the National Shawmut Bank on July 1, 1930, and Greaney's check was executed in favor of the Boston National Bank in the above amount, which check cleared on July 3, 1930.

On or about December 1, 1930 the stock held by the defendant Karnow unbeknown to him became part of a transaction for the purchase of the shares of stock in the Boston National Bank, and as a result, some of the stock held by Mr. Karnow was surrendered, and on March 11, 1931 the proceeds of $9,500 was applied by the bank toward the payment of the Karnow note.

In May, 1931, at the request of Mr. Karnow, and with the consent of the bank, the defendant Greaney substituted his note and placed himself in the same position as the said Karnow. Neither the defendants Karnow or Greaney ever received or intended to receive any benefit from this transaction, and the same was done purely as an accommodation for the bank. Neither Karnow, nor the bank, nor the

defendant ever contemplated or intended that either Karnow or Greaney or both should become the owners of the said stock.

The defendant Greaney therefore prays that the said bill of complaint be dismissed as against him, and for his costs.

By his Attorney,

JAS. I. YOFFA.

This cause was thence continued from term to term to the September Term, A. D. 1937, when, to wit, November 9, 1937, said cause was set down for hearing on the pleadings and the evidence and was heard in part by the court, the Honorable George C. Sweeney, District Judge, sitting.

At the same term, to wit, November 16, 1937, the following Motion to Transfer Suit to Law Side of the Court was filed by defendants Thomas E. Greaney and R. D. Mahoney:

MOTION TO TRANSFER SUIT TO LAW SIDE OF THE COURT.

[Filed November 16, 1937.]

Now come the defendants, Thomas E. Greaney and R. D. Mahoney, and move that said suit be forthwith transferred to the law side of the court in compliance with Equity Rule No. 22, to be there proceeded with, and assign as reasons therefor:

I. That it appears from undisputed evidence in support of the allegations of the bill of complaint that said bill seeks to enforce assessment on the full par value of the bank stock in question.

II. That for purposes of said assessment the plaintiff has a remedy at law, and no other remedy.

Aufdenkamp et al. v. *L'Herrison* (and cases cited therein), 56 F. (2nd S.) 344.

Armstrong v. *McAdams et al.*, 72 F. (2nd S.) 314.

American Trust Co. et al. v. *Grut*, 80 F. (2nd S.) 155.

III. That in so far as the suit seeks collection of the note of the defendant Greaney, the plaintiff has a plain, adequate and complete remedy at law.

IV. The bill of complaint alleges no ground of relief in equity

Wherefore, the defendants move that this cause be ordered transferred to the law side of this court, that the plaintiff be ordered to amend his bill accordingly and that such other orders as to costs or otherwise may be made as to the court may seem proper.

By their Attorney,

DANIEL J. GALLAGHER.

This cause was thence continued to the December Term, A. D. 1937, when, to wit, December 10, 1937, it was ordered by the court, the Honorable George C. Sweeney, District Judge, sitting, that the defendant's motion to transfer suit to the law side be denied, defendant's exceptions being saved.

On the said tenth day of December, A. D. 1937, said cause came on for further hearing on the pleadings and evidence, and was fully heard by the court, the Honorable George C. Sweeney, District Judge, sitting as aforesaid.

Also on the said tenth day of December, A. D. 1937, the following Motion of Respondent Nimon Karnow to Dismiss Bill was filed:

MOTION OF RESPONDENT NIMON KARNOW TO DISMISS BILL AS TO HIM.

[Filed December 10, 1937.]

Now comes the respondent Karnow at the conclusion of the hearing and before argument and moves that the bill of complaint in so far as it affects him be dismissed and assigns the following reasons therefor:

1. That the complainant did not introduce any evidence to bring this matter into equity.
2. That no evidence was introduced by the complainant in support of the allegations contained in the bill of complaint concerning him.

By his Attorney,

LOUIS G. STONE.

Said cause was thence continued under advisement to the March Term, A. D. 1938, when, to wit, June 16, 1938, an opinion of the

court was announced finding and ruling that defendant Greaney was liable for the stock assessment claimed by plaintiff and on his note in the sum of $14,553.66 with interest.

Said cause was thence continued to the present June Term, A. D. 1938, when, to wit, June 30, 1938, the following Final Decree for the plaintiff and dismissing bill as to defendants Nimon Karnow and R. D. Mahoney with their costs taxed at $ is entered in accordance with the aforementioned opinion:

FINAL DECREE.

June 30, 1938.

FORD, J. This cause came on to be further heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed, as follows, viz:

1. That the plaintiff recover from the defendant Thomas E. Greaney the sum of $32,582.54 (which sum is made up as follows: principal amount due on note $14,553.66, with interest on said note from January 4, 1932 to June 30, 1938 in the amount of $5,666.20 and principal amount due on stock assessment $9,144, with interest on said stock assessment from August 18, 1932 to June 30, 1938 in the amount of $3,218.68) and costs taxed at $

2. That the bill of complaint be dismissed as to the defendants Nimon Karnow and R. D. Mahoney, with their costs taxed at

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

June 30-38.

F. J. W. F.,
D. C.

From the foregoing final decree, a notice of appeal to the United States Circuit Court of Appeals for the First Circuit was filed by Thomas E. Greaney, defendant, on the twenty-eighth day of September, A. D. 1938.

OPINION.

June 16, 1938.

SWEENEY, J. This is a suit in equity brought by the receiver of the Boston-Continental National Bank to enforce a stock assessment on 457.2 shares of stock of the bank, against these defendants, individually and jointly, and against the defendants Greaney and Karnow, to enforce the payment, with interest of a note signed by defendant Greaney in the sum of $14,553.66.

FINDINGS OF FACT.

For the purpose of clarity, the Boston National Bank will hereinafter be referred to as the Boston, the Continental National Bank will be referred to as the Continental, and the consolidated Boston-Continental National Bank will be referred to as the Boston-Continental.

Early in 1930, the Boston found itself in a position where it was the owner of 190 shares of its own stock. This ownership came about by the purchase of the stock from one of its directors who threatened to dump it on the open market. Fearing the result of such action, the bank took the stock over, and carried it as a cash item. Such ownership was in violation of the National Banking Act, 12 U.S.C.A. § 83. In order to conceal this illegal ownership, a scheme was devised whereby the note of some third person would be carried on the bank's books as a receivable, and the stock would be carried on the records either in the name of that third person, or in someone's name other than the bank.

The defendant Greaney was a director of the Boston, and after conference with one Ulin, who was president of the bank, he prevailed upon the defendant Karnow to execute a note in the sum of $23,500 as an accommodation to the bank. Karnow was a small depositor in the Boston, and never intended to pay the note or become a purchaser of its stock, or to do anything other than to accommodate the bank, probably in the hope that in a pinch the bank would return the favor.

Karnow's note was discounted by the bank, and he received from it a check in the sum of $23,203.14. In accordance with the agreement between the parties, Karnow deposited this check in another bank to

the credit of the defendant Greaney. Greaney issued his check drawing against this sum, and paid the money to the Boston. The shares were then transferred on the books of the bank to the defendant Greaney.

When the Karnow note became due he was prevailed upon to renew it, which he did against his better judgment. Shortly thereafter he caused the stock to be transferred on the bank's records from Greaney's name to his own, and took actual possession of the certificates. I find that even at this time he did not intend to become a purchaser of the bank's stock, but merely took the certificates as security. From this time on, Karnow repeatedly made efforts to have his liability on the note cancelled, but, between Ulin and Greaney, he was prevailed upon to make several renewals of the original note.

In September of 1930, a consolidation was proposed by the officers of the Continental whereby the Boston-Continental would be formed. Ragan and Balter were the guiding geniuses of the Continental, and were the originators of the proposed consolidation. Ragan intended to have control of the consolidated bank, and, for that purpose, was in the market for shares of the old Boston. A purchase price was agreed on between the Boston and Ragan for the purchase of the shares here involved at $150 a share. Not having the ready money to consummate the deal, Ragan and Balter issued a series of notes, and delivered them to the bank. The bank then turned three of the notes, aggregating $24,000, over to Greaney with instructions that when they were collected, the stock now standing in Karnow's name, was to be transferred to Ragan and Balter. Greaney was to secure the release of such shares from Karnow as were needed to cover any payments made by Ragan and Balter on their notes which were held by Greaney.

In December of 1932, the consolidation was effected, and Ragan became the president of the Boston-Continental. Under the plan of consolidation, the 190 shares of Boston stock, standing in the name of Karnow, became convertible into 684 shares of the new stock. In March of 1931, the first Ragan and Balter note became due and was paid. This was in the sum of $9,500; and on receiving payment Greaney surrendered one of the notes in that same amount, and Kar-

now released the requisite amount of stock. On the books of the bank Karnow was credited with the payment of $9,500 on his note.

Karnow found that his participation in this transaction, and the effect of having his note outstanding in the bank was reflecting on his credit in his indivdual business. Becoming more insistent, he prevailed upon the now consolidated bank to release him from liability on the note, which was done. Greaney substituted his note to the bank in the sum of $14,553.66. When the Greaney note was discounted the bank's check was used to discharge the Karnow note. So far as it is pertinent to the issues, I find that it was agreed between Ragan and Greaney that the latter should hold the stock turned over by Karnow on the same terms as Karnow had held it. Greaney, however, did not carry the stock in his own name, but registered it in the name of R. D. Mahoney, the third defendant here. For all intents and purposes, notwithstanding the agreement between the bank and Greaney to the effect that he was to stand in Karnow's shoes, Greaney became the owner of this stock at this time, although he caused it to be registered in the name of Mahoney. He did this without Mahoney's knowledge or consent, and Mahoney was never informed of this fact or of anything about this transaction, received no dividends, and, in fact, knew nothing of it until suit was instituted by the plaintiff.

On December 22, 1931, the Boston-Continental closed its doors, and a receiver was appointed to administer its affairs. On July 11, 1932, the Comptroller of the Currency made an assessment against all owners of shares in the bank in an amount equal to the par value of their shares in accordance with Section 5151 of the Revised Statutes of the United States, and due demand was made for payment thereof. The assessment on the 457.2 shares here involved has never been paid.

Conclusions.

I find and rule that Mahoney has overcome any presumption of ownership that arose from the fact that his name was carried on the books of the corporation as a stockholder. See *Finn* v. *Brown*, 142 U. S. 56, 67.

We next pass to the question of liability of the defendant Karnow.

At the time that the bank closed, the Karnow note was not a receivable in the hands of the receiver, it having previously been discharged by the bank's acceptance of the Greaney note in May of 1931. Likewise, Karnow was not a stockholder in the bank at the time that it closed its doors—his stock certificate having been surrendered in May, on the strength of which a new certificate was issued to Greaney standing in the name of Mahoney. The Karnow transfer of stock I find to have been in fact an out-and-out transfer made in good faith, and not under apprehension of the failing condition of the bank. See *The Germania National Bank of New Orleans* v. *Case*, 99 U. S. 628. In all his actions Karnow shows clearly that the registration of the stock in his name was never intended to be a purchase by him of the stock, but was only for the accommodation of the bank. In any event, he divested himself of whatever title he had, long before the bank failed.

Passing to the defendant Greaney, I find an entirely different situation prevailing. It must be borne in mind that Greaney was a director of the old Boston bank as well as of the new Boston-Continental, and, as such, is chargeable with a higher degree of responsibility than either Karnow or Mahoney. The fact that he may have agreed with Ragan that he would stand exactly in Karnow's shoes when he took over the Karnow obligation cannot affect the fact that he was a director of the bank, that he had a more intimate knowledge of the transaction than either Karnow or Mahoney, and that he owed a duty to the depositors of the bank to protect their interests. What may have been a legitimate activity for Karnow was not a legitimate one for Greaney. On his own story, he was involved in a scheme, the purpose of which was to deceive the national bank examiners, and to conceal a violation of the National Banking Laws. It is quite true that Karnow had participated in this matter, but he did so as an outsider, and owed no duty to the depositors of the bank. Karnow also extricated himself from the entire situation seasonably, and did so under circumstances which lead this court to believe that he did it in good faith and without apprehension of the failing condition of the bank. Greaney cannot establish his immunity from liability on this note by a claim that he stands on an equal footing with Karnow. See

Lyons v. *Westwater*, 181 Fed. 681; 193 Fed. 817. The reasoning in this case seems also to fix the liability for stock assessment squarely on the shoulders of Greaney. As between Greaney and Mahoney, there can be no doubt that Greaney had the title to this stock for Mahoney had no knowledge that his name was even being used in the transaction. As between the bank and Greaney, prior to the bank's closing of its doors, there might be some question of the right of the bank to insist that Greaney was the owner of that stock. As between the receiver, who stands in the shoes of the creditors, the depositors, and the general public, Greaney is estopped to deny the ownership of the stock on the reasoning of *Lyons* v. *Westwater, supra.* He had held himself out to the public, to the bank examiners, to the Comptroller General, and to the depositors of the Boston-Continental as an owner of stock either in his own name or in the name of Mahoney. To now be allowed to retract these representations would effect a fraud on all the parties. I therefore find and rule that Greaney is liable for the stock assessment claimed by the plaintiff. I therefore find and rule that the defendant Greaney is liable to the plaintiff on his note in the sum of $14,553.66 with interest.

A decree may be submitted in accordance with the above.

NOTICE OF APPEAL.

[Filed September 28, 1938.]

Notice is hereby given that Thomas E. Greaney defendant above named, hereby appeals to the Circuit Court of Appeals for the First District, fr[redacted]he final decree entered in this action on June 30, 1938.

[redacted]NIEL J. GALLAGHER,
Attorney for Defendant THOMAS E. GREANEY,
209 Washington Street, Boston, Mass.

DEFEN[redacted]MAS E. GREANEY'S CONDENSED STATEMENT OF TESTIMONY.

[Filed September 28, 1938.]

On April 23, 1930, the Boston National Bank issued its cashier's check in the amount of $28,203.14 and received therefor 190 shares of its own stock. The bank held this stock in lieu of its cashier's check as a cash item from April 23, 1930 to June 30, 1930.

The stock of the Boston National Bank had an active daily market during this period, *i. e.*, from April 23, 1930 to June 30, 1930, varying from $163 to $140 per share.

This ownership of the stock was in violation of the National Banking Act, 12 U. S. C. A. s. 83.

In order to conceal this illegal ownership, Charles Ulin, the president of the bank, devised a scheme whereby the note of some third person would be carried on the bank's books as a receivable, and the stock would be carried on the records either in the name of that person or in someone's name other than the bank.

Mr. Ulin conferred with the defendant Greaney, who was a director of the Boston National Bank, sometime in the latter part of June of 1930 and prevailed upon Greaney to persuade the defendant Karnow to execute a note in the sum of $23,500 as an accommodation to the bank. Karnow was a small depositor in the Boston National Bank, and never intended to pay the note or become a purchaser of its stock, or to do anything other than to accommodate the bank.

Karnow's note was discounted by the bank, and he received from it a credit in the sum of $23,203.14. In accordance with the agreement between the parties, Karnow deposited his check for that amount in another bank, to the credit of the defendant Greaney. Greaney thereupon issued his check for this sum, payable to the Boston National Bank. The shares were then transferred on the books of the bank to the defendant Greaney.

When the Karnow note became due, he was prevailed upon to renew it, which he did against his better judgment. Shortly thereafter he caused the stock to be transferred on the bank's records from Greaney's name to his own, and took actual possession of the certificates. Karnow did not intend to become a purchaser of the bank's stock, but merely took the certificates as security. From this time on, Karnow and Greaney repeatedly made efforts to have Karnow's note cancelled.

In September of 1930, a consolidation was proposd by the officers of the Continental National Bank whereby the Boston-Continental National Bank would be formed. Ragan and Balter were the execu-

tive officers of the Continental National Bank and were the originators of the proposed consolidation.

A purchase price of $150 per share was agreed on between the Boston National Bank and Ragan for the purchase of a block of shares in which the 190 shares, above referred to, were included. Not having the ready money to consummate the deal, Ragan and Balter issued a series of notes, and delivered them to the bank. The bank then turned three of the notes, aggregating $24,000, over to Greaney with instructions that when they were collected, the stock now standing in Karnow's name, was to be transferred to Ragan and Balter. Greaney was to secure the release of such shares from Karnow as were needed to cover any payments made by Ragan and Balter on their notes which were held by Greaney.

In December of 1932, the consolidation was effected under the charter of the Boston National Bank and Ragan became the president of the Boston-Continental National Bank. Under the plan of consolidation, the 190 shares of Boston National Bank stock, standing in the name of Karnow, became convertible into 684 shares of the new stock. In March of 1931, the first Ragan and Balter note became due and was paid. This was in the sum of $9,500. Greaney surrendered one of the notes in that same amount, and Karnow released the requisite amount of stock. On receiving payment, the bank credited Karnow's note with the payment of $9,500.

Karnow found that his participation in this transaction, and the effect of having his note outstanding in the bank was reflecting on his credit in his individual business. Becoming more insistent, he prevailed upon the now consolidated bank to surrender his note to him.

Greaney was prevailed upon by the bank to substitute his note in the sum of $14,553.66. This note was discounted and the bank's check was issued to discharge the Karnow note. It was agreed that Greaney should hold the stock turned over by Karnow, on the same terms as Karnow had held it and that he was to stand in Karnow's shoes. After consultation between the officers of the bank and Greaney, the stock was registered in the name of R. D. Mahoney, the third defendant. Mahoney had no knowledge nor did he consent to,

nor was he ever informed about this transaction and knew nothing about it until suit was instituted by the plaintiff.

The District Court has found that:

> "For all intents and purposes notwithstanding the agreement between the bank and Greaney to the effect that he was to stand in Karnow's shoes, Greaney became the owner of this stock at this time."

The following, by questions and answers, is the only evidence relevant to the facts in this aspect of the case (Testimony of Thomas E. Greaney, December 10, 1937, pages 8, 9, and part of 10 of said testimony):

> *A.* Carney and I went down and saw Reagan and we said to him, "Now Carney's note has been reduced by ninety five hundred dollars, but he still wants to get through with it. He wants to be released on the note. He does not want to carry it any longer. He would like to have you find somebody else." Carney said, "Yes, I would. I don't want to be on that note. I have been on there quite a while and I want to get through with it." Reagan said, "We will find somebody to take your place. We will get somebody. Just have a little more patience."
>
> *Q.* 1. I think that was in April. *A.* Shortly after that payment anyway, and I used to meet Carney quite frequently on the street, and every time I would see him he would say, "What are they going to do with me down there? I want to get off the note. I am not in the bank." I said, "Well; we will go down once more." Finally he said to me, "I am not in the bank now, and I can't get accommodation there, and I need some money for my season and can't borrow some money. But if I show it in my statement, they will not give me a line of credit. I will have to disclose the note in my statement, but I can't explain to them what it is. It has come to a time I will have to get out of it." We explained to Reagan. Reagan says, "I haven't a substitute for it now. I don't know who to put on there." He says, "Why don't you take it?"
>
> *Q.* 2. Was this the second visit to Reagan? *A.* Yes. That

was the next visit. I says, "I don't want to take it. I don't want to sign a note for a note like that." He said, "Well you sign a short note, one for about thirty days", and I said, "Can't you make it fifteen days?" He said, "No, I want to make it thirty days to have a little breathing space to get hold of somebody", and I signed the note for thirty days. That was in May, I am quite sure, and Carney sent the stock he was holding down to the bank. Reagan told me, he said, "You hold that stock same as Carney has. You have the stock. You hold it the same way Carney did, and we will probably get another man."

Q. 3. Go on from there. *A.* A little while after that the cashier of the bank telephoned me, a fellow by the name of Schofield, and said "We have got that stock down here. Whose name do you want it put in?" I says, "I don't know. It is up to the bank, isn't it?" He said, "No. Don't you know anybody?" I says "No". "Well", he said, "I don't know. Can't you give me a name?" I said, "No, not off hand." He said, "Why don't you come down and see Reagan?" I went down and saw Reagan and I said, "I just received a call from Mr. Strobel, and he asked me to find a name to put the stock in." So Reagan thought a minute and said, "I don't know. You have got to find somebody satisfactory to us, and he ought to be satisfactory to you too. You are middle man here. You are holding the stock." I said, "You can't suggest anyone", and he said, "Well, no, I can't off hand. Can you think of somebody?" I said, "Well, I have a son-in-law. Perhaps we can put it in his name." He said, "That will be all right"; asked me what his name was, and I gave it to him.

Q. 4. What name did you give him? *A.* Raymond D. Mahoney.

Q. 5. He is your son-in-law? *A.* Yes.

Q. 6. In consequence of that, what happened? *A.* The stock was made out in that name and sent to me.

On December 22, 1931, the Boston-Continental Bank closed its doors, and a receiver was appointed to administer its affairs. On July 11, 1932, the Comptroller of the Currency made an assessment

against all owners of shares in the bank in an amount equal to the par value of their shares in accordance with Section 5151 of the Revised Statutes of the United States, and due demand was made for payment thereof. The assessment on the 457.2 shares here involved has never been paid.

Shortly after the plaintiff closed his case, the defendant moved for a transfer of the cause to the law side of the court under Equity Rule 22, which the court denied and to which denial the defendant excepted.

DANIEL J. GALLAGHER,
Attorney for Appellant THOMAS E. GREANEY.

PLAINTIFF-APPELLEE'S STATEMENT OF ADDITIONAL TESTIMONY.

[Filed October 6, 1938.]

Plaintiff-appellee hereby files the following statement of the testimony of Harold J. O'Donnell, Nimon Karnow (whose name has erroneously been spelled C-a-r-n-o by the reporter), R. D. Mahoney and Thomas E. Greaney, for inclusion in the record pursuant to Rule 75, Federal Rules of Civil Procedure:

HAROLD J. O'DONNELL, plaintiff's first witness, testified as follows:

I was in charge of Boston-Continental National Bank's loan department when the bank suspended, and ever since then I have been, and am, assistant to the bank's receiver. I have full access to the bank's records and am familiar with them. I have searched those records for information in respect to this case. In and as a part of the bank's regular business records, I have found the following, which bear on the facts of this case:

[It was agreed, with the court's approval, that in lieu of testifying from the records the witness might introduce the records and that photostatic copies thereof might be filed in lieu of the originals.]

EXHIBIT 13. A sheet from the bank's stock holder's ledger, on which it appears that on 5–6–31, certificate 1295 of Boston National Bank and certificates 709 and fractional certificate 237 of Boston-Continental National Bank, all outstanding in the name of Nimon

Karnow, were surrendered and in lieu of them there were issued to R. D. Mahoney certificates 929 to 933 (both inclusive) and fractional 311, representing 457.2 shares of Boston-Continental National Bank stock; also that on September 10, 1931, said certificate 933, representing 57 shares, had been surrendered and reissued to said Mahoney in two certificates, 1085 for 37 shares and 1086 for 20 shares.

EXHIBIT 14. The bank's stock transfer book record showing the May 6, 1931 part of the same transaction.

EXHIBIT 15. The bank's stock transfer book record of the September 10, 1931, part of the same transaction.

EXHIBIT 16. The stubs in Boston-Continental National Bank's stock book, from which certificates 929-933 had been detached, bearing the usual record; also certificate 933, affixed to the stub (933) from which it had been detached. This certificate, for 57 shares, issued in the name of R. D. Mahoney under date of May 6, 1931, bears on its back an ordinary stockpower which appears to have been signed "R. D. Mahoney". The certificate is endorsed "Cancelled". Each of the stubs 930 to 933 (both inclusive) bears the notation "See 929". On stub 929 is a record that Boston National certificates 1295, dated October 17, 1930; and Boston-Continental National Bank certificate 709 and "Frac. 237", dated March 12, 1931, representing altogether 457.2 shares were all being transferred. Stub 929 bears the further notations *"From whom transferred* Nimon Karnow" and *"Issued to* R. D. Mahoney." There is a pencil notation at the bottom of stub 929 reading, "Mailed 5-7 to Thomas Greaney thru 933".

EXHIBIT 17. Stub of certificate 1085, containing record showing transfer *from* R. D. Mahoney of original certificate 933 for 57 shares, dated May 6, 1931, and issuance of certificate 1085 *to* R. D. Mahoney for 37 shares. The stub bears the notation, "See #1086" and also bears, pasted upon it, a receipt which reads, "Received Certificate No. 1085 & 1086 For 57 Shares this 10th day of September, 1931. J. A. Geary".

EXHIBIT 18. Sheet from "Stockholders Ledger Boston National Bank" showing record of Nimon Karnow as an owner of certificates 1295, 1296 and 1297, issued October 17, 1930, for 190 shares. There is an endorsement on this sheet reading, "Transferred to Boston Con-

tinental Nat'l Bank: Certificate No. 1296 & 1297 into 706-709 & Frac. 236 & 237.—1295 into 929-933."

EXHIBIT 19. "Stock Holder's Ledger" sheet in name of Nimon Karnow recording on 3-12-31 the surrender of "Bos. Nat." certificate 1297 (27 shs) and issuance of certificates 709 and 237 for 97.2 shares; also, on 5-6-31, surrender of 709 and 237 and issuance of 929 & Frac. 311 to R. D. Mahoney.

EXHIBIT 20. Stock-transfer book sheet of Boston-Continental National Bank showing two transactions, both of March 12, 1931, in which stock was transferred from Karnow as follows:

Cert. Surrendered Nos. Bos. Nat.	Shares	Cert. Issued Nos.	Shares	Transferred to
1296	50	706	100	Joseph Balter
1297	13	707	100	
		708	26	
		F. 236	0.8	
Bos. Nat.				
1297	27	709	97	Nimon Karnow
		F237	0.2	

EXHIBIT 21. The stubs, and attached cancelled stock certificates, Nos. 1295 for 100 shares, 1296 for 50 shares and 1297 for 40 shares, of Boston National Bank. The record on the stubs, and on the certificates shows transfer of all these 190 shares from Thomas E. Greaney to Nimon Karnow on October 17, 1930, out of certificates 1236, 1240, 1237, which had been issued to Greaney as apparent owner under date of June 30, 1930. The power of attorney on the back of each of these cancelled certificates is signed Nimon Karnow. The stock powers on the backs of 1296 and 1297 are signed in blank; but on 1295 the name R. D. Mahoney has been written in as assignee of its 100 shares. All bear the United States revenue stamps required for transfers.

EXHIBIT 22. Cancelled stock certificate and stub 709, for 97 shares of Boston-Continental National Bank stock, showing issuance to Karnow out of Boston National Bank certificate 1297, owned by Karnow, dated March 12, 1931.

EXHIBIT 23. Sheet from "Stockholders' Ledger" Boston National

Bank" showing record of Thomas E. Greaney. Shows ownership of 15 shares prior to June 30, 1930; acquisition on June 30, 1930 of certificates 1236 for 100 and 1237 for 80 additional shares; acquisition on July 10 of certificate 1240 for 10 more shares; disposal on October 17, of certificates 1236 for 100 shares, 1240 for 10 shares, and 1237 for 80 shares. Also shows payment of $358.75 dividends to shareholder on 8-1-30.

EXHIBIT 24. Boston National Bank cancelled stock certificates, and attached stubs 1236 for 100 shares, 1237 for 80 shares and 1240 for 10 shares issued to Thomas E. Greaney as their owner. Numbers 1236 and 1237 are dated June 30, 1930, and 1240 is dated July 10, 1930. The stock power on the back of each of these cancelled certificates is signed by Thomas E. Greaney, whose signature is known to the witness. The stock powers on 1236 and 1237 are each dated July 1, 1930, and the power on 1240 is dated July 17, 1930.

EXHIBIT 25. The witness testified that exhibit 25 was a tabulation made by him from the records which he had just finished putting into the evidence in this case; and that this tabulation is correct, according to such records. Exhibit 25 was thereupon offered and received, as an aid to the court in clarifying the evidence which the witness had already submitted.

The witness also further testified as follows:

(10) I know the name J. A. Geary on the receipt attached to the stub for certificate 1085. It is the name of a young woman who used to answer Greaney's telephone when I called his office. (11) The record shows that the shares issued in Mahoney's name were standing on the records in Karnow's name at the time of issuance to Mahoney. (12) The records show the derivation of Karnow's shares. On Exhibit 20 is shown, in two entries, a transaction in which Karnow had shares represented by old certificates issued in part to Joseph Balter and the remainder re-issued to himself. (13) Certificates 1295, 1296 and 1297, for 190 shares of Boston National Bank stock are shown by the record to have been issued to Karnow out of stock standing in Greaney's name as record owner. (14) We have the certificates themselves, Nos. 1236, 1237 and 1240, that had been issued to Greaney for those 190 shares, later issued to Karnow. [They are

offered as Exhibit 24.] I know Greaney's signature and that Greaney's signature is signed to the stock power on each of the certificates 1236, 1237 and 1240. (15) The pencil notation on the bottom of stub 929 was there when I first saw the record, a year or two ago. I do not know who wrote it. It indicates that certificates 929 through 933 were mailed May 7 to Greaney. (17) The note set forth in the bill of complaint is held by the bank as an asset; is wholly unpaid; and there are no credits allowable against it. The full original amount of the note, $14,553.66 and interest, is due to the bank and unpaid. (18) It is one of a succession of three renewal notes. The original transaction appears from the records to have been a loan of $14,553.66 to Greaney on May 4, 1931.

Plaintiff's Exhibit 28 is a cashier's check in the amount of $14,481.25 issued by the bank to Greaney on that date, endorsed payable to the order of Karnow Brothers, and endorsed by Karnow. The name Karnow Brothers was a trade-name under which defendant Karnow carried on business. This cashier's check connects with a note for $23,500 payable to the order of the bank, which Karnow Brothers on June 28, 1930, made. Successive renewals of that note had brought the amount of the transaction to $23,866.32 when, on March 11, 1931, a credit of $9,500 had been entered against that amount, leaving a balance of $14,366.32, which balance appears from the records to have been paid on May 4, 1931, the date when the cashier's check to Greaney, endorsed to Karnow, had been issued. (23.)

Exhibit 33 is a photostat of Greaney's account with the National Shawmut Bank and of the front and back of his check, dated June 30, 1930, for $23,203.14 payable to Boston National Bank.

The shareholders' ledger sheet containing the record of shares issued to Greaney (Exhibit 23) shows payment of $358.75 to Greaney on August 1, 1930, as a dividend on his bank shares

The amount of Greaney's check to the bank, $23,203.14, is exactly the same amount as had been paid by the bank on April 23, 1930, by its cashier's check to Reed & Company (24) for 164 shares of the bank's stock. That is the same amount which was withdrawn by Karnow on his $23,500 note.

On *cross-examination* the witness testified as follows:

On June 26, 1930, there was only $23.32 credit to Karnow on his commercial account in the bank. (27) After June 26 there were only three credits to that account, one for $89.27 on July 12, and one for $88.86 on August 11, and one for $88.44 on September 9. I cannot say whether, by June 26, 1930, Karnow had practically ceased doing business with the bank. The three credits, just mentioned, are represented as "mortgage payments"—probably collections on a note left with the bank.

The records show that Karnow had no indebtedness to the bank on June 19, 1930. His liability card shows "total direct, 0; total indirect, 0; secured, 0, 6-19-30". Subsequent to that time he made no deposits, except for the three credits which I have just mentioned. His highest indebtedness to the bank since April had been $16,000.

On being later recalled for further cross-examination (84) the witness testified:

There is a debit of 11-29-30 against Karnow Brothers in the amount of $23,806.81, representing a note due the bank. On March 11, 1931, that note was renewed for only six days in the amount of $23,866.32, being then over-due. On March 17, 1931, there was a credit of $9,500 on it. The note then continued to lie in the over-due department until May 4, 1931, when a credit of $14,366.32, the entire balance, with accrued interest, was entered against it, showing payment. Between March 17 and May 4, while that note lay in the bank over-due, Karnow is shown by the records to have discounted customer's notes in the bank—one of $5,000 on March 20, and one of $1,200 on March 31. Later, on May 6, another of $3,340 was discounted, and another of $3,475.

According to the records, Karnow's indebtedness to the bank has been fully paid.

NIMON KARNOW, called as plaintiff's second witness, testified on *direct examination* as follows:

Q. 1 (by Mr. Fisk). You have been sitting in court and heard Mr. O'Donnell's testimony? *A.* Yes.

Q. 2. Do you remember your giving Boston National Bank a note for $23,500, June 27–28, 1930? *A.* Yes.

Q. 3. Will you state what you did in connection with that transaction, state the circumstances of that transaction? *A.* I received a call from Thomas E. Greaney one morning and I went over to his office and he told me he wanted me to do him a favor and it will also be a favor to the bank, to go down to the bank and sign a note for $23,500, and when I get credit for it, to turn over the account to him. He said, "You will never be called upon to pay for that note or take care of it". He said, "Furthermore, I have some stock in the bank and I will give it to you as security". I told him I had no cash account in the bank and could not sign the note. He said, "Never mind, it is all arranged, just go down there and sign the note."

Q. 4. Did you give the bank security for the note? *A.* No, I told him I had no cash account in the bank and he said, "Never mind, it is all arranged. They will give you $23,000." So I went down to the bank and met Charles Ulin, and he gave me a note to sign for $23,500 and next day I received the credit and immediately issued a check to Thomas E. Greaney for like amount and brought it in to Thomas E. Greaney and the next day he told me to deposit it in the National Shawmut Bank for him in the branch on Harrison Avenue, which I did.

Q. 5. Did you pay the note? Was the note paid that you gave the bank? *A.* Yes. About a week or ten days later he gave me some shares in the bank to hold as security, so that the note had about two months to run, and so it ran along about two months. Two weeks before it was due, he told me, I will have to renew that note and told me I would not have to renew it any more, just this once. So we renewed the note and I paid the interest after renewal of same, and when this came due, I wasn't going to renew the note any more. The note was due, naturally you would be called for payment, but I wasn't to renew the note any more, and it was to be up to Thomas E. Greaney to get me my note back again. So he went with me to Charles Ulin of the Boston National and talked with him and as a result of the conversation he told me it was only a matter of a few days and I would get my note back again. I didn't get it and next week I went again with the same result. I didn't get it, and some time later I was in the Boston Continental Bank and was talking with

some official and had a conversation about the stock that I had as security and he advised me to put it in my name. And so I did, and after a while, I could not get my note back and went to Thomas Greaney again and finally got him to go to the Boston Bank and he went with me and when we came in I told them they charged me interest for the note, money I did not owe them. And he said, "That is all right, they will fix that up". We went to some official and they gave me credit for that interest back again, made some arrangements whereby I paid them off the note and they gave me back the note. They asked me for the shares and I gave them back the shares and that is all.

Q. 6. Did you say anything about the shares being transferred out of your name? *A.* Yes, I told you when I was talking in the bank some official advised me to transfer them to my name

Q. 7. I mean from your name to somebody else? *A.* I did not transfer anything.

Q. 8. Did you ask the bank to transfer them, or say anything to the bank about transferring them? *A.* I paid for the note and they asked me for the shares, that is all. They did not ask me who I transferred them to.

Q. 9. When Mr. Greaney turned the stock certificates over to you, there were three of them, I believe? *A.* I can't remember.

Q. 10. Do you remember whether his name was signed on the back, and you could have them transferred at the time you got them? *A.* Yes, I guess they were signed on the back.

Q. 11. And he turned them over to you as security for the money? *A.* Yes.

R. D. MAHONEY, called as a witness for the plaintiff, (36) testified that he had acquired no stock of Boston-Continental National Bank; had first become aware of the use of his name in this connection when he had been served as a defendant in this suit; that he had received no dividends; signed nothing; or in any other way been connected with any of these stock transactions; that what appears as his signature on the stock power on certificate 933 is not his signature; that he has neither authorized nor ratified any part of

these transactions; that his name was used wholly without his knowledge, authority or approval.

THOMAS E. GREANEY, called as a witness in his own behalf, (40) testified as follows:

Q. 1. How long were you connected with the Boston National Bank? *A.* I think about since 1922 or '23.

Q. 2. Were you a director from the beginning of your relations with the bank? *A.* Yes.

Q. 3. You have been or were continuously a director all the time up to the closing in '31? *A.* Yes.

Q. 4. I will ask you to come to the question of the transactions involved here and tell us first when the matters involved in this case were first brought to your attention. I am asking now of the time, about when? *A.* I think sometime around the summer of 1930.

Q. 5. Could you make it any closer than that? *A.* It was at the end of June or first of July.

Q. 6. Who first brought it to your attention? *A.* Mr. Ulin.

Q. 7. Mr. Charles Ulin? *A.* Yes.

Q. 8. At that time what was his position in the bank? *A.* President of the bank.

. . . . . .

Q. 9. Who was present at the time the conversation took place between you and Mr. Ulin? *A.* Just Mr. Ulin and myself.

Q. 10. Where did it take place? *A.* In my place of business.

Q. 11. Tell us what was said as fully as you can remember? *A.* Well, Mr. Ulin came in, I am not quite sure whether it was the morning or the afternoon, I think it was the morning, and said, "I am in a little bit of a jam". I says, "What is the matter"? He says, "The bank has been carrying some stock as a cash item on their books and the examiners are in the bank at the present time and I am going to get the stock out of there." I says, "What do you want me to do"? He says "I would like to have you suggest somebody that can substitute a note for the stock". As near as I can remember I said, "Why don't you get somebody"? He said, "I have tried to think of a man to help me out, but I can't seem to think of anyone I want to trust that way". I mentioned a few names and finally we hit upon

the name of Karnow. "How does he stand down there"? He says, "I think you have the right man". He telephoned to the bank to find out if Karnow owed anything and they told him he did not. I says, "You get in touch with Karnow and ask him if he will do the bank a favor and do you a favor at the same time". So he called Karnow on the phone, he explained to him what it was. He said the stock had been thrown back from somebody in Worcester and what he wanted Karnow to do was to substitute a note for the stock, and take over the stock and hold it for him and put a note in that would pass the examiners. He felt Karnow would be all right and he said "Send him down in the morning, but don't say too much to him. Everything will be all right. You tell him to sign the note and he will probably sign it. And I will give you the security for it which will be more than the note itself, so he won't take any chances." I got in touch with Karnow and told Karnow to go down to the bank, which he did and came back and told me everything was all right.

Q. 12. You have given us all the conversation that you had with Mr. Ulin? *A.* Yes, in substance.

Q. 13. You got in touch with Mr. Karnow? *A.* Yes.

Q. 14. How soon after you talked with Mr. Ulin? *A.* It was directly afterwards.

Q. 15. It was the same day? *A.* Yes.

Q. 16. Tell us what you had to say to Karnow? *A.* I asked him if he would do it and he said, "Yes", he would.

Q. 17. Do what? *A.* Do a favor for the bank. I said, "Mr. Ulin was in here and he wants you to do the bank a little favor. He has some stock down there that he wants you to take over. Karnow asked a few questions and I said, "I don't know all details, but if you will ask Mr. Ulin, when you get to the bank, he will explain it to you." He said, "I don't know. If you say it is all right for me, I will do it." I said, "You are not taking any chances, you are doing it for the bank. You are doing them a favor and they probably will do you a favor some time."

The Court. What was the next thing that happened after he left your place?

The Witness. The next thing seemed to be the following day. I saw Karnow. He came in and said, everything was all right, he signed a note down there and said, "They did not ask me any questions. I signed the note and they gave him credit for it".

Q. 18. Anything else? A. I don't think there is anything else that day.

Q. 19. Did you have any talk the following day, following Karnow's return, did you have talk with Mr. Ulin? A. Yes, I called up Mr. Ulin.

Q. 20. That second day? A. Yes, as near as I can remember.

Q. 21. Tell us the talk? A. He said Karnow was down there so everything is all right, everything handled all right.

Q. 22. Was there any other talk? A. Not at that time

Q. 23. Next thing was that you saw Karnow? A. Yes.

Q. 24. Tell us the talk then? A. I saw Karnow the following day and he came in with the credit slip and said, "I have a credit at the bank of $23,000 for that note I signed. What am I going to do with the money, it does not belong to me". I said, "Well, I will tell you. Mr. Ulin left instructions to have you deposit that check in my account and he would take it back into the Boston National again."

Q. 25. How did you get that instruction? A. I think I am a little ahead of my story. When I called Ulin and asked him about the Karnow affair, if Karnow's deal went through, the deal he wanted to put through, he said, "Yes". He said, "We credited him with the money and he will give the money to you and you turn it back to the bank."

Q. 26. So you just relayed that to Karnow? A. Yes.

Q. 27. Following that what was the next thing that occurred? A. Well, the next thing was, I think, that the bank sent down stock for $500 shares, something like that.

Q. 28. Before you reached that point, did you learn or in any way verify whether or not Mr. Karnow had deposited in your account? A. Yes, Karnow made the deposit himself.

Q. 29. How did you find out that he had done so? *A.* He brought me back a duplicate slip.

Q. 30. I would like to have you give the court every step of the thing, following your receipt of this deposit slip, what was the next thing that happened? Did the bank send down to get some stock? *A.* Yes, stock that was to be security for the note Karnow signed.

Q. 31. Sent the stock to whom? *A.* Well, they sent it to me.

Q. 32. To whom did stock run, to whom did the certificates run? *A.* I don't think I know what you mean.

Q. 33. Were the certificates to you, were they your certificates of stock? *A.* They were made out to me, yes.

Q. 34. Do you remember how many of them, and what they were? *A.* No, I don't, I think there were around 200 shares.

Q. 35. According to the evidence here it was 190 shares? *A.* 190 shares.

Q. 36. Would that be in accordance with your best recollection, if you have any about it? *A.* Yes.

Q. 37. How soon after Mr. Karnow got this credit, did you receive this stock? *A.* About the same time I think, probably same day.

Q. 38. What did you do with the stock? *A.* I signed the stock, as I remember it, to have it ready in case they were going to call for it.

Q. 39. That is, you endorsed it? *A.* Yes, signed the transfer.

Q. 40. To have it ready for what? *A.* The bank did not expect to hold it very long, they were going to dispose of it. They were not going to keep Karnow's note in there very long.

Q. 41. Then what next? You got the stock within a day or two after,— *A.* Yes, I think the stock came right along as soon as that note was signed.

Q. 42. You retained that stock in your own possession? *A.* Yes, I did.

Q. 43. What was the next thing? *A.* The next thing I can remember is that Karnow's note came due.

Q. 44. Do you remember how long that note itself was for? *A.* It was short, I think, thirty or sixty days.

The Court. Did you keep the stock?

The Witness. Yes, I kept the stock.

Q. 45. There has been some evidence there was a check delivered to you in payment of a dividend on this stock amounting to $358. and something over, does that correspond with your recollection? A. I did receive a dividend of $1.75 a share the stock was on a 7 percent basis.

Q. 46. At that time you owned some stock besides the lot that had been sent down to you? A. I had fifteen shares.

Q. 47. And the dividend check which you received included this 15 shares as well as the stock which you were holding on the loan? A. I think it did.

Q. 48. Upon the receipt of that dividend check, what if anything did you do? A. This stock of mine 190 shares was never put on record. They were not put into my assets at all. So when the bookkeeper got the check for $300, she asked me what it was and I saw that I was entitled to a check like that on 15 shares of stock and called up the bank and he said, "Well, we will have to leave the note with Karnow but you better turn that money over to Karnow and let him apply that to the interest on the note."

Q. 49. Giving this money to Karnow? A. Yes.

Q. 50. Did you send the check to Karnow or deliver it? A. Yes.

Q. 51. On or about the fifth or sixth of August? A. Well, after the dividend was paid. A few days later, I suppose.

Q. 52. For what amount? A. I don't remember, around $300, I think.

Mr. Gallagher. It was $332.50.

Q. 53. Would that be your recollection, around $332.50? A. Yes, I think that is about it.

Q. 54. How did you arrive at the amount of that check that you sent Karnow, whatever it was? A. The bookkeeper deducted the dividend that was due on 15 shares, and separated that. She credited that to my account and sent the balance to Karnow.

Q. 55. That was in August? *A.* First few days of August, yes. That was after the semi-annual dividends.

Q. 56. Mr. Ulin, I understand, told you how Karnow took that and applied it to the interest due on his note? *A.* Yes, he did.

Q. 57. That was in August? The first note as I understand the testimony was falling due around the 27th or 28th of August? *A.* Some time within that period.

Q. 58. Did you have any talk with Karnow at the time that you delivered the check or sent it to him? *A.* Yes, I did.

Q. 59. What was the talk? *A.* I told him that he was to take care of the interest on the note and the note would have to be renewed. He said he didn't like to do it.

Q. 60. Didn't like to do what? *A.* To renew the note, he didn't care to do it. I told him I had had a talk with Ulin and he would not have to carry it very long and I advised him to renew the note.

Q. 61. Did there come a time when that stock that you had been holding was put into the name of Karnow? *A.* Yes.

Q. 62. Did that occur before or after the first note fell due? *A.* I don't know.

Q. 63. Have you now any knowledge of what occurred at the time that stock was put into the name of Karnow so that you can tell us what it was? A. My recollection is that the stock was put into Karnow's name two or three months after he signed the first note.

Q. 64. Up until the time it was put in Karnow's name, it remained in your custody? *A.* Yes, it did.

Q. 65. I want to go back just a little in the order of time to the matter of that dividend check, which you testified you received on or about August 1st. I show you this paper and ask you what it is? *A.* My check made out to Mr. Karnow. [Received as Defendant's Exhibit A.]

Q. 66. Defendant's Exhibit A is check drawn on the First National Bank of Boston, dated August 5, 1930, check No. 245, payable to the order of N. Carno for $332.50, signed by,—is that your signature on the check Mr. Greaney? *A.* Yes.

Q. 67. It is endorsed N. Karnow, Karnow Bros. endorsement

shows it went through the Atlantic National Bank? Before the recess I think we spoke about the time the stock which you had held had been put into Karnow's name. At that time did you have anything to do with the delivery of the stock to Karnow, or the bank, or anything in connection with the transfer to Karnow's name? *A.* Yes, I turned the stock over to Karnow. I was holding the stock and Karnow asked for the stock and I asked Ulin if it was all right to give it to him and he said, "Yes, let him have it, that is his security."

Q. 68. You turned the whole thing over to him? *A.* Yes.

Q. 69. You think that was two or three months after Karnow had first given his note to the bank? *A.* I think so.

Q. 70. Following that, what was the next thing that happened? Let me ask you about the renewals of the note, were there further renewals? *A.* Yes, there was. My recollection was that Karnow got that stock after the second renewal of the note. When he renewed the note he asked for the stock. He said, "I renew the note and you are holding the security. Why can't I have that, I should have that in my possession." So I turned the stock over to him.

Q. 71. Was anybody present when you and Karnow had that talk about his having the stock? *A.* I don't think so, I don't remember anybody.

Q. 72. Are you sure that in any event you spoke to Ulin about it? *A.* Yes.

Q. 73. Do you know how many times that note was renewed, or how many times that original note was renewed? *A.* I think there were two or three renewals.

Q. 74. Was there anything said by anybody with regard to the renewal or objection to it in any way at the time of the second renewal? *A.* Only Karnow's objections, Karnow always objected.

Q. 75. To whom did he express his objection? *A.* He expressed it to me.

Q. 76. To anybody else? *A.* He and I went down to the bank and saw Mr. Ulin.

Q. 77. You went to the bank I suppose as a result of something

that transpired before you went to the bank, what was that? *A.* Karnow's insistence.

Q. 78. Karnow had gone to see you? *A.* Yes.

Q. 79. In substance, what was the talk? *A.* He said he did not want to go on that note any longer. He wanted to get through with it. It was only supposed to be for a short time and he would like to have Mr. Ulin get somebody else to substitute for him.

Q. 80. Was it as a result of that that you and Mr. Karnow went to see Mr. Ulin? *A.* Yes.

Q. 81. What took place then? *A.* Mr. Ulin said to him, "You are not taking any chances". He put him off.

Q. 82. At that time when that conversation took place had the stock been transferred to Karnow's name? *A.* I don't remember.

Q. 83. Go on from there, what was the next episode? *A.* I don't know what happened after that.

Q. 84. At some time did you come into possession of a series of notes? *A.* Yes.

Q. 85. Tell us about them? *A.* I received two notes for $9500 and one note for $5000 from Mr. Ulin.

Q. 86. Whose notes were they? *A.* Balter and Regan, or Regan & Balter.

Q. 87. What is Balter's first name and Regan's first name? *A.* Regan's first name was Edward and Balter's first name was Joseph.

Q. 88. Regan was at that time president of the bank was he? *A.* Yes.

Q. 89. And Mr. Balter a director of the bank? *A.* Yes.

Mr. Gallagher. Perhaps we can agree that at the time these $9500 notes were given, Mr. Regan was not then president. but became president subsequently.

Mr. Fisk. Mr. Regan was president after the reorganization, December 26, 1930, prior to that time Mr. Ulin had been president.

Q. 90. When these notes came into your possession, who gave them to you? *A.* Mr. Ulin gave them to me.

Q. 91. Was there anything said at the time? *A.* Why, yes. He said that Regan and Balter were going to buy the stock and when they paid the notes to deliver the stock to the bank.

Q. 92. Those notes were a series were they, $9500 coming due at different periods? A. Yes.

Q. 93. Were the $9500 notes in sequence or was the $5000 note between them on the due date? A. I don't remember.

Q. 94. When you got those notes what was said as to the future as to what you were to do with them? A. He told me to hold them and when the notes came due to send down the stock, enough stock to represent the notes.

Q. 95. Did you have the stock at that time, or was that after it had been transferred to Karnow? A. Karnow had the stock at that time.

Q. 96. And you had nothing? A. No, I didn't have anything.

Q. 97. Until you got these notes? A. That's right.

Q. 98. And then was it the arrangement that as they paid the notes a certain number of shares of stock corresponding to the amount of the note would be surrendered. To Balter and Regan? A. Yes.

Q. 99. In pursuance of that arrangement, what if anything occurred? A. Well, the first note came due and I notified Karnow to send down sufficient stock to the bank to take care of the note. The amount of the stock was represented by the size of the note.

Q. 100. That was one of the $9500 notes? A. Yes.

Q. 101. Did Karnow send down the stock? A. He did.

Q. 102. So far as you knew did he get credit for it on his note? A. I think he did.

Q. 103. What was the next episode? A. A little later —

The Court. When the $9500 notes or any portion of them were paid, who were they paid to?

The Witness. The bank.

The Court. You held the notes?

The Witness. Yes.

The Court. But payments were made to the bank?

The Witness. Yes.

The Court. What did you do with the notes then?

The Witness. I sent the note down to the bank to be paid and Karnow sent down an equal amount of stock.

Q. 104. Did any part of the money paid by Balter or Regan come to you? *A.* No.

Q. 105. Or, so far as you know, to Karnow? *A.* No.

Q. 106. After you surrendered that note for $9500 did you retain the other two notes? *A.* Yes.

Q. 107. For how long a time? *A.* Right up to the time the bank closed.

Q. 108. You had them then? *A.* Yes.

Q. 109. And no further payments made on account of those notes? *A.* No.

Q. 110. What did you do with the notes when the bank closed? *A.* I think shortly after, before the bank closed, when all the notes came due and it was not paid, Balter and Regan did not pay it, and I gave it to an attorney for collection.

Q. 111. Did he collect it? *A.* No, he merely collected the interest, I think.

Q. 112. Was there any arrangement whereby you turned that note over to the attorney for collection? *A.* Yes, the notes were to be made,— they were merely turned over.

Q. 113. I mean, was there any arrangement made with the bank, or anything by which you turned over that note for collection? *A.* I don't remember any.

Q. 114. The note became due, you sent it to the bank the day before it was due? *A.* Well, the bank notified me I had the note on ha and the bookkeeper knew the date that the note became due.

Q. 115. Coming back to the first note that was paid, when you sent that note down for payment, was it the day before? *A.* Probably the day before.

Q. 116. The day before it was due? *A.* Yes.

Q. 117. The second time you did not send that note to the bank? *A.* I think I did.

Q. 118. After it was overdue and unpaid did the bank send it back to you? *A.* Yes.

Q. 119. What did they say then? *A.* They said it was not paid, they merely returned it unpaid.

Q. 120. The note was payable to you? A. No, it was payable to Ulin.

Q. 121. And Ulin endorsed it to you? A. He endorsed it in blank.

Q. 122. After it was unpaid, he sent it back to you? A. I don't think Ulin was in the bank at that time.

Q. 123. Well, somebody sent it back to you? A. Yes.

Q. 124. What did they say to you then? A. They didn't say anything, just said it was unpaid.

Q. 125. They didn't tell you to get after Regan and Balter did they? A. No.

Q. 126. I show you this paper and ask you what it is? A. $9500 note signed by Balter and Regan.

[Received in evidence as Defendant's Exhibit B.]

. . . . . .

Mr. Gallagher. Note of Charles Ulin, $9500 payable to Charles Ulin, signed Edward M. Regan and J. Balter, payable January 10, 1932, and dated December 1, 1930, and the endorsement is "without recourse in any event, Charles Ulin".

Q. 127. As long as there may be some confusion about this matter, I want to go back just a bit with this witness. I want to go back with you to the time when you told us that Karnow was pressing to be taken off the note, wanted to get rid of the obligation. Now you and he and Ulin had a talk, at least one, on that subject? A. We did.

Q. 128. And as I understand it, the first one of those, and if I am in error, you correct me, the first one of those talks, as near as you can recall, was at the time the first renewal note was coming due? A. Yes.

Q. 129. He had demurred somewhat at the first renewal? A. Yes.

Q. 130. But when that renewal note came due, he again with a little more insistence urged that he be discharged of obligation on that note? A. Yes.

Q. 131. At that time, assuming that that would be some time in November of 1930? A. Yes, it would be about that time.

Q. 132. At that time, what was said by you, or Karnow with regard

to the renewal? *A.* Ulin promised Karnow that he would find somebody to take it off his hands.

Q. 133. At that time, you had not received these Balter-Regan notes? *A.* No.

Q. 134. Are you quite sure about that? *A.* I am not quite sure.

Q. 135. I don't mean to imply that you are in error if you say that you are not, because that is my own understanding. When the notes came into your possession, you had already surrendered the stock, as you told us? *A.* Yes.

Q. 136. And it had been transferred to Karnow's name? *A.* Yes.

Q. 137. When that first note of that series Balter-Regan notes came due, as I understand you now, you sent the note to the bank? *A.* Yes.

Q. 138. Seasonably before the due date? *A.* Yes.

Q. 139. For collection? *A.* Yes.

Q. 140. You got no receipt or token of receipt, you simply turned it over to the bank? *A.* That's right.

Q. 141. When were you called upon by the bank to surrender a block of stock corresponding to the $9500? *A.* At the time the note was paid. The same day, I think.

The Court. Do you know why the bank did not keep the Regan note and Balter note in addition to stock of Balter and Regan thereby relieving Mr. Karnow on this accommodation note?

The Witness. They didn't have the money to pay for it, I guess. He gave notes instead. The bank did not want to give him the stock until the notes were paid.

The Court. They had Karnow's notes, it was understood Karnow's notes would have to be collected?

The Witness. Yes.

The Court. They were just as well off with Balter and Regan's notes, weren't they? Notes running over a year?

The Witness. Well, now let's see.

The Court. Karnow was trying to get out of it, wasn't he?

The Witness. Yes.

The Court. When you got the Balter and Regan notes you had

a perfect opportunity to say to the bank, "Here relieve Karnow at least that much."

The Witness. Yes.

The Court. And keep Regan and Balter's notes?

The Witness. Yes.

The Court. Why didn't you do it?

The Witness. They did relieve Karnow of his notes.

The Court. After the notes were paid?

The Witness. The notes were never paid.

The Court. This second note if it had been paid: Karnow would not have got off with that liability until this note was paid, would he?

The Witness. Karnow was also liable when Balter and Regan gave the notes.

The Court. How was he?

The Witness. Well, at that time I think my note was substituted.

Q. 142. Let me ask you: Was this Balter-Regan transaction any part of the consolidation arrangement between the two banks? *A.* Yes, they wanted to acquire stock of the consolidated bank.

Q. 143. I don't quite get what you say? *A.* They wanted to acquire stock of the consolidated bank. They wanted to get some bank stock.

Q. 144. Regan and Balter? *A.* Yes.

The Court. Under this arrangement, this particular note had over a year to run?

The Witness. Yes.

The Court. They were not going to get the stock until the notes were paid?

The Witness. That's right.

Q. 145. This note that was put in as Defendant's Exhibit B was the last of the three to come due? *A.* I think it was.

Q. 146. What became of the $5000 note so far as you know? *A.* I think the $5000 note was the note that was defaulted.

Q. 147. Where did that land finally? You sent it to the bank, as I understood you to tell the court, for collection? *A.* Yes.

Q. 148. On or about the due date? *A.* Yes.

The Court. Was this the one he sent to the bank for collection?

Mr. Gallagher. No, it was the $5000 one.

The Witness. That could not be because the due date was so far away.

Q. 149. My question was: Where, so far as you know, did that $5000 note wind up, land? *A.* I think it came back to me as near as I can remember.

Q. 150. After the default? *A.* Yes.

Q. 151. Have you got it? *A.* No, I haven't got it now.

Q. 152. When you say you think it landed back with you, is that based on some recollection that you have, or are you merely guessing? *A.* I think I am guessing on that.

Q. 153. I will ask you this: Was there any conversation between Balter and Regan, Karnow and yourself with regard to substituting Balter and Regan for Karnow? *A.* Yes.

Q. 154. When as nearly as you can say, did the conversation take place? *A.* I can't tell you.

Q. 155. Then tell us as nearly as you can, what the substance of the conversation was? *A.* I think it was the conversation before that when the Karnow note was taken out of the bank and he surrendered the stock he was holding back to the bank.

Q. 156. Well, was it at that time, that there was a conversation between you four men with regard to Balter and Regan substituting for Karnow? *A.* I am not quite sure.

Q. 157. I understand you to say there was such a conversation? *A.* Yes.

Q. 158. And you have some difficulty in fixing the time of that conversation? *A.* Yes.

Q. 159. Laying aside for the moment the question of when it occurred, I will ask you to give us what the conversation was? *A.* Karnow and I went down to the bank for him to get rid of the note finally. It was agreed that he could not carry the note any longer.

Q. 160. Keep your mind on the question I am asking you. The substance of conversations is what I would like to give. *A.* I am a little hazy on that question.

Q. 161. Was there anything in that conversation about the consolidation of the two banks? *A.* I don't remember.

Q. 162. But there was a conversation, as I understand you to say, along those lines? *A.* Yes, we talked.

Q. 163. But what was said you don't recall?

Q. 164 (by the Court). Who was present? *A.* Balter was there, Regan, Karnow and myself.

Q. 165. Ulin? *A.* I don't think he was.

Q. 166. You don't remember any of the conversation? *A.* I remember that they were anxious to come in.

Q. 167. Do you remember the conversation? *A.* No, I can't remember it.

Q. 168 (by Mr. Gallagher). Let me ask you this: Before you put your note into the bank was there a consultation between you and Karnow and Regan and Ulin? *A.* Yes.

Q. 169 (by the Court). Do you say Ulin was there? *A.* Not Ulin.

Q. 170 (by Mr. Gallagher). Ulin has passed out of the picture at that time? *A.* Yes.

Q. 171. Regan had become president? *A.* Yes.

Q. 172. So that you and Karnow were at that time talking to Regan? *A.* Yes.

Q. 173. What about? *A.* About having Regan find somebody to take Karnow's note.

Q. 174. What was said in substance? *A.* I went down to the bank with Karnow and I told Regan "Karnow is in a fit about this thing. He has been on there a long time and wants to get out." He deposits in another bank and wants to get through with this. Regan says: "Yes, I know all about it, but I haven't got anybody to take it." Karnow said, "I can't carry it any longer." Regan said to me, "Why don't you take it?"

Q. 175. To you? *A.* Yes. I said I would rather not, I wish you would find somebody else, but Karnow was so anxious and I think he told me that he could get a line of credit in another bank if he didn't have to show that note in his statement, and I took the note.

I substituted my note for Karnow's and Karnow had the stock with him at that time, or went back and got the stock and turned it back.

Q. 176. That was some time before this series of notes of $9500 and $5000? *A.* Yes.

Q. 177. A considerable time before that? *A.* Quite a while, yes. That was the time my note went in in place of Karnow's.

Q. 178 (by the Court). You say now this substitution of Greaney for Karnow took place before the series of notes were given?

Mr. Gallagher. That is what the witness said. I thought it was otherwise.

The Court. You have asked him if it was before these notes were issued and he says it was.

Mr. Gallagher. Perhaps I may have unconsciously misled him. My understanding of the chronology was about the same as your Honor's.

Q. 179 (by Mr. Gallagher). What was the fact Mr. Greaney? *A.* The fact is that the stock was split and Karnow got the stock and the notes were sent to me.

Q. 180. What is the fact, did you have the notes at the time of this conversation that you have just described with Regan and Karnow, or didn't you? *A.* I don't think I had the notes there.

Q. 181. Is that your best recollection? *A.* Yes.

Q. 182. Was that $9500 payment made before or after you gave your note to the bank? *A.* That was made before.

Q. 183. Payment was made before you gave your note to the bank? *A.* Yes.

Q. 184. When that $9500 payment was made, I think you testified that you were holding that note and the two others of the series? *A.* That's right.

Q. 185. Have we got that nailed down now so that we can be sure about it according to your recollection? *A.* Yes, I think so.

Q. 186. What was the next thing in connection with this transaction that occurred? *A.* Well, I think that the due date of the note the fact that the $5000 note came due.

Q. 187. After you gave your note, what was done with the stock as far as you know? *A.* With the stock that Karnow returned?

Q. 188. Yes. *A.* The bank had the stock and they wanted to give it to me for security.

Q. 189. Did they give it to you for security? *A.* Yes.

Q. 190. Turned it over to you for security? *A.* Yes.

Q. 191. At or about the time that you gave your note for fourteen thousand and some odd dollars? *A.* Yes.

Q. 192. How long did you hold it? *A.* I held it right along.

Q. 193. Until the bank closed? *A.* Yes.

Q. 194. When that stock was delivered to you in whose name was it recorded? *A.* It was made out in my son-in-law's name.

Q. 195. Will you tell us how it came about that it was made in the name of your son-in-law? *A.* Yes, when the stock was ready they asked me what name to put it in. They made the transfer at that time I saw either Mr. Strobel or Mr. Regan.

[Adjournment from November 10, 1937, to a later date.]

THOMAS E. GREANEY, testifying further in his own behalf, said as follows:

Q. 196 (by Mr. Gallagher). Since the last hearing on this matter, have you had an opportunity to look over the stenographic notes of the testimony which you gave? *A.* I have.

Q. 197. Do you find in those notes some matters which you testified to that you wish to amend or correct? *A.* There are some. Yes.

Q. 198. I am going to ask you some questions about the matter of the Regan Balter notes with the idea that your testimony as to that matter completely now will automatically correct the points in which the testimony previously given, you say, was erroneous. When did you first hear or learn about the plan of Regan and Balter to purchase stock in the bank? *A.* At a meeting held in my house.

Q. 199. About when? *A.* About August or September, 1930.

Q. 200. Who first spoke to you about that matter? *A.* Mr. Balter.

Q. 201. Tell the court what Mr. Balter said to you about it as fully as you can remember it. *A.* Mr. Balter called me at my office and said, "You know I am a director in the Continental National Bank and we have a president down there, a fellow by the name of Regan, and both of us are interested in securing Boston National Bank stock

for the purpose of consolidation." He said, "I think it would be a very good idea if the two banks were consolidated. What do you think about it?" I said, "I haven't got much to say about it. Why don't you speak to Mr. Ulin about it?" He said, "Why don't you speak to him? I am not very friendly with him. Mr. Regan does not know him at all. So I wish you would make an appointment with us to meet Mr. Ulin, so we can go over the matter."

Q. 202. Did you do anything in consequence of that request? *A.* Yes. I saw Mr. Ulin and told him what Mr. Balter told me, and he said, "I would be willing. I will talk with them."

Q. 203. There was a meeting, wasn't there? *A.* Yes.

Q. 204. Where did it take place? *A.* In my house.

Q. 205. Who was present? *A.* Regan, Balter, Ulin and myself

Q. 206. State what occurred at that meeting in as orderly and complete a way as you can give it to us? *A.* Well, we sat down, and I said to Mr. Ulin, "I explained to you why these gentlemen are here." He said, "Yes. Are you interested in buying some stock? Are you thinking of consolidation?" They said, "Yes." He said, "How much stock would you buy?" They said, "Well, we will take five thousand shares. We would like to get sufficient shares to control the thing." He said, "What is your notion of a price?" They said, "On a large block like that we would not want to pay over one hundred twenty-five dollars a share." He said, "That is ridiculous. The bank's stock is worth a great deal more than that. I would not consider less than two hundred." They figured around and finally decided on one hundred fifty dollars a share. Mr. Ulin agreed to sell them stock at one hundred fifty dollars a share.

Q. 207. Was there anything further which was said as to the stock, and their purchase of it, as to how they were going to pay for it, what was the amount, if you can give it any more definitely than you have? *A.* As an evidence of good faith he asked them to put up a check, and they said during the week they would give us a certified check for that amount.

Q. 208. Was there anything that you recall them saying, how it was to be paid for? *A.* They said they would pay for it in cash.

Q. 209. How long did that meeting last? *A.* Two or three hours.

Q. 210. Subsequent to that meeting, the following day, I want you to tell the court the incidents in their order as they occurred, in connection with the matter. A. Well, during the following week, on a telephone message from Mr. Balter to come down to the Continental National Bank, he came down, and said, "I have got that binder check ready for you." Check to bind the bargain. And he gave me a certified check for fifty thousand dollars, made out to me. That check was to be held, I was to hold the check until delivery was consummated, and that was to be applied on the price of the shares.

Q. 211. Whose check was that? A. That was, as I remember it, the Continental National Bank check.

Q. 212. You took the check? A. Yes, I did.

Q. 213. Under a special arrangement, you were to hold it until the thing was carried through? A. That's right.

Q. 214. And then it was to be applied to the purchase of the nine hundred shares of stock or thereabouts? A. Yes.

Q. 215. Subsequent to that, what happened? A. They started negotiations with the Comptroller, and an examiner was to close the consolidation of the two banks. So he told them they would have to go to Washington, and Mr. Ulin advised me to be ready. He said, "We are going to send down a committee of the bank to go to Washington", and to be ready when the time came to go down and see the Comptroller, and I did get a call later on.

Q. 216. And you went? A. I went. Yes.

Q. 217. What transpired at the Washington meeting? A. There was a committee of directors from the Continental and from the Boston National Bank, and we had an appointment with the Comptroller and he had the statements of the banks, and we sat down and he said, "Well, the structure of that Continental has got to be strengthened before I will consent to a consolidation. There are some loans I don't like and I don't think the bank is quite strong enough. It has to be propped up a bit." They asked him what he expected them to do, and he said, "Well, it will take two hundred thousand dollars to put that bank in shape. You can do that, and I will consent to the consolidation."

Q. 218. Was that in substance the upshot of that meeting? A.

Yes. He said further "I expect you to find a committee from each bank to examine the other bank's loans to see if they are satisfactory, and if it is not satisfactory, I want to report it."

Q. 219. Subsequent to that, what was the next thing that followed? *A.* The next thing that followed, Ulin called me up one day and said, "These fellows will not pay cash for the stock they wish to buy. They made me a proposition for me to take notes." I said "What is the reason?" He said, "Well, they haven't got any cash. The money that they intended to use to buy the bank stock, they have got to use to fix up the Continental."

Q. 220. Thus far you had the fifty thousand dollars, which you were holding the check for? *A.* No. They needed all that money that they agreed to use to buy bank stock, the fifty thousand dollars.

Q. 221. Anything else? *A.* And he said they needed the fifty thousand dollars, too.

Q. 222. What happened subsequent to that or in consequence of it? *A.* Well, I returned the check to the bank. I gave the check to Mr. Ulin, I am quite sure, but I gave it up. Mr. Ulin was to handle the whole thing.

Q. 223. What was the next thing? *A.* The next was for Ulin to send me down twenty four thousand dollars worth of Regan and Balter notes.

Q. 224. Was there any talk about that? *A.* Yes, he said, "These notes,—Karnow is after you and he is after me to get his note out of the bank. These notes will take care of Karnow's note. Send them down to take care of Karnow's note." That is the way he put it.

Q. 225. What is the amount of those notes to date? *A.* One $9500, one $5000 and another $9500; total $24,000.

Q. 226. About when did you get those notes? *A.* I got those notes in December, I think, 1930.

Q. 227. And one of them was the note that we had here that was put in as an exhibit the other day? *A.* Yes, sir.

Q. 228. I am showing you defendant's Exhibit "B". That was one of the notes, was it? *A.* Yes.

Q. 229. Did you learn how many notes had been given by Regan and Balter to take over this stock? How many promissory notes?

The detail about them, anything about them? *A.* They gave Ulin a whole stack of notes.

Q. 230. Coming due when? *A.* At different times, thirty days apart.

Q. 231. Were they coming due on the same day every month? *A.* My recollection is, I am quite sure, they were due on the tenth of every month; tenth of each month.

Q. 232. You received in December some three notes aggregating $24,000? *A.* Yes, I did.

Q. 233. On the arrangement, did you have any definite idea as to how many shares of stock those notes would take care of? *A.* Well, each note would take care of an equivalent amount of stock at the rate of one hundred fifty dollars a share according to the bargain.

Q. 234. Was there anything said as to what was to be done with the notes or with the stock, as these notes were collected? *A.* Karnow at that time held the stock, and I was to get stock from Karnow, a sufficient amount of stock to offset the notes as they became due.

Q. 235. When the first note came due, it was paid, wasn't it? *A.* Yes, it was.

Q. 236. Tell the court just what part you had in that and how it was done, as far as you know? *A.* I had a record of when the note came due, and I wrote Mr. Karnow. I was away at the time. I wrote him to send down the amount of stock, $9500 worth of stock.

Q. 237. At what rate? *A.* At the rate of $150 a share; and to go to my office and get a $9500 note and cash the two and bring them down to the note teller's window and they would take care of it.

Q. 238. That was done? *A.* Yes.

Q. 239. What happened to the Karnow note with reference to that transaction? *A.* The Karnow note was credited with the $9500 paid by Balter and Regan.

Q. 240. Do you know how that payment was handled? *A.* I don't know.

Q. 241. Mr. Karnow surrendered the stock? *A.* Yes.

Q. 242. What did he receive for it? *A.* He received a credit slip I think.

Q. 243. Wasn't it a check? *A.* It might have been a check.

Q. 244. Whatever it was, he got credit on the note? *A.* Yes.

Q. 245. You were down in Florida at the time? *A.* Yes.

Q. 246. Following that, with regard to these notes, what was the next thing that happened? *A.* There was a renewal. The next thing that happened—

Q. 247. We are now in January, was it; that first demand came? *A.* No. It came in March, I think. March, 1931.

Q. 248. In the meantime, back in August Karnow had given a renewal of his original note? *A.* Yes, he had.

Q. 249. And that renewed note fell due in three months as you recall it? *A.* Yes.

Q. 250. The testimony shows; that would be in November? *A.* Yes.

Q. 251. When he gave another note, did he? *A.* Yes, he gave another note.

Q. 252. Coming to the second one of these Regan and Balter notes, tell us about that. *A.* The second Regan and Balter note was a five thousand dollar note. It came due in September, 1931. That note wasn't paid.

Q. 253. Tell us what occurred. What you had to do about it or with it? *A.* Previous to that Karnow had returned some time in May; this note of Karnow's, I mean this $9500 was paid in March.

Q. 254. Yes. *A.* Karnow and I went down and saw Regan and we said to him "Now Karnow's note has been reduced by $9500, but he still wants to get through with it. He wants to be released on the note. He does not want to carry it any longer. He would like to have you find somebody else." Karnow said, "Yes, I would. I don't want to be on that note. I have been on there quite a while and I want to get through with it." Regan said "Well, we will find somebody to take your place. We will get somebody. Just have a little more patience." I think that was in April. Shortly after that it was anyway. And I used to meet Karnow quite frequently on the street, and every time I would see him he would say, "What are they going to do with me down there. I want to get off the note. I am not in the bank." I said, "Well, we will go down once more anyway". He said to me, "I am in another bank now, and I can get

accommodation there and I need some money for my season, and I can borrow some money; but if I show that note in my statement they will not give me a line of credit. I will have to disclose the note in my statement, but I can't explain to them what it is. It has come to the time I have got to get out of it." We explained that to Mr. Regan. Regan said, "I haven't a substitute for it now. I don't know who to put on there. He says, "Why don't you take it?"

Q. 255. Was this the second visit to Regan? *A.* Yes. That was the next visit. I says, "I don't want to take it. I don't want to sign a note for a thing like that." He said, "Well you sign a short note, one for about thirty days." And I said, "Can you make it fifteen days." He said, "No, I want to make it thirty days to have a little breathing space to get hold of somebody", and I signed the note for thirty days. That was in May I am quite sure and Karnow sent the the stock he was holding down to the bank. Mr. Regan said to me, "You hold that stock same as Mr. Karnow has. You have the stock. You hold it the same way Karnow did, and we will probably get another man."

Q. 256. Go on from there. *A.* A little while after that the cashier of the bank telephoned to me, fellow by the name of Strobel, and said, "We have got that stock down here that Mr. Karnow sent down. Whose name do you want it put in?" I said, "I don't know. It is up to the bank, isn't it?" He said, "No. Don't you know anybody?" I says "no". "Well", he said, "I don't know. Can you give me a name?" I said, "No, not off hand." He said, "Why don't you come down and see Mr. Regan?" I went down and saw Regan and said to him, "I just received a call from Mr. Strobel and he asked me to find a name to put the stock in." So Mr. Regan thought for a minute and said, "I don't know. You have got to have somebody satisfactory to us, and he ought to be satisfactory to you too. You are the middle man here. You are holding the stock." I said, "Can you suggest anyone?" And he said, "Well, no, I can't off hand. Can you think of somebody?" I said, "Well, I have a son-in-law. Perhaps we could put it in his name." He said, "That will be all right", and asked me what his name was. And I gave it to him.

Q. 257. What name did you give him? *A.* Roland D. Mahoney.

Q. 258. He is your son-in-law? *A.* Yes.

Q. 259. In consequence of that what happened? *A.* The stock was made out in that name and sent to me.

Q. 260. Go along from there, which you say was sometime in May. *A.* Yes. My note became due in June. I gave you a short note to give him a chance to get somebody. My note came due and I went down and saw him again and I said, "Have you got somebody? I don't want to renew that note." And he said, "No, I haven't, but I don't see why you have to worry over it. You are holding those Balter-Regan notes and have the stock for security," and I said, "That is not the idea. I don't want to have a note in the bank". I owed the bank some more money. I had another small note in the bank and didn't want this one to show. So he said, "Well, I will get somebody." He said, "You will have to sign another note. Give me time enough this time; make the note a little longer, and I will get you out of it." That was in June, I am quite sure, and I did sign a note. I think it was sixty days.

Q. 261. June, 1931? *A.* Yes.

Q. 262. Go on from there? *A.* That note came due and there still wasn't anybody. So I signed another note. We had the same kind of a talk over again. And when his notes were going to be paid, Regan-Balter notes, and that stock was going to be taken out. So I saw my way out and signed another note to come due in November. In September, when that five thousand dollar note came due, we figured it out in my office and we found that we had at September about 120 shares, something like that, somewhere in the vicinity of 120 shares to take care of the September 10 note, the Regan and Balter five thousand dollar note. The stock had been split. So it was in a little different position from what it was. It figured $150 a share, but it did not figure the same amount of shares. They reckoned it to be at the rate of $150 a share and I looked over the certificates and found a certificate for one hundred shares, and another one for fifty-seven shares. I had to get one hundred twenty odd to take care of the note, and I sent the fifty-seven shares down to the bank.

Q. 263. There was one certificate? *A.* One certificate for fifty-seven shares and I sent that down to the bank to settle up the interest; the one hundred share certificate had already been attached to the note when it went to the bank. In the meantime, that was done on the date the note came due, on the 10th day of September. I was down that way and went into the bank and saw Mr. Regan, and he said, "Your note is coming due this afternoon." I says, "I have got that stock ready for you." He says, "Gee! we can't pay that note. We are not in a position to do it now. Balter is short of money and I can't handle it. I have got to have an extension on it." I said, "Well, then there is no use sending the stock down. There is no sense in my sending the note down as far as that goes." He said, "No, we can't pay it. We want more time on it." I said, "How much time do you want on it?" He said, "Probably a month or two. We will be able to take care of it then."

Q. 264. In the meantime, right in that period there, what further did you hear from your fifty-seven share certificate of stock that you had sent to be divided? *A.* The bank sent it back.

Q. 265. I am showing you two certificates numbered, respectively, 1085 and 1086, and ask you if those are the certificates that they sent back to you in exchange for your certificate for fifty-seven shares? *A.* They look like the same certificates.

Q. 266. There is no question about it? *A.* There cannot be.

[These two certificates, 1085 and 1086, received as "Defendant's Exhibit C".]

The Court. What was the split of stock, the ratio of re-issued stock in the consolidation?

Mr. Gallagher. 3.6

Q. 267. I show you certificate No. 929 Boston Continental National Bank and ask you if that is the certificate for 100 shares which you say you endorsed? *A.* Yes, that is it.

[Certificate 929 received in evidence as "Defendant's Exhibit D".]

268. Going on from the point where you say Mr. Regan told you that the note would not be paid. *A.* Yes.

Q. 269. What, if anything, did you do in consequence of that information? *A.* I didn't send down the stock. I didn't have the twenty shares endorsed. I would not bother with it any more.

Q. 270. What did you do about the note, if anything? *A.* I held that note.

Q. 271. Did you take any action on it at all? *A.* I did not at that time.

Q. 272. What did you do finally on the note? *A.* Finally I gave the note over to an attorney for collection.

Q. 273. About when? Do you remember? *A.* I think it was in November. He had not paid anything, and I think that was in November.

Q. 274. Did he collect anything for you? *A.* He collected five hundred dollars.

Q. 275. On account? *A.* Yes.

Q. 276. And you received the five hundred dollars? *A.* Yes, I did.

Q. 277. What did you do with it or about it? *A.* He gave me the five hundred dollars and I went down and saw Mr. Regan again. He said, "I can't give you any stock for this five hundred dollars." I said, "What do want me to do with it?" He said, "I will tell you. You have been paying the interest on your note, haven't you?" I said, "Yes, I have." He said, "Why don't you apply that to the interest? The bank is going to adjust this all out pretty soon, and I am going to take those shares anyway. I am going to take the rest of them." And I said, - I was always kicking about the interest, you know.

Q. 278. Yes. Did your attorney succeed in getting anything in satisfaction of the demand besides the five hundred dollar payment? *A.* Yes, he did. He got some extra security.

Q. 279. What was that security? *A.* That was consolidated stock. Stock of the two banks.

Q. 280. I show you certificates of the Boston National Bank numbered, respectively, 147 and 148 and ask you if those are the certificates that you received as an additional security? *A.* Yes. They were made out to Ruth Dennis. I remember the name.

[Certificates 147 and 148 received in evidence as "Defendant's Exhibit E".]

Q. 281. After that were there any other further transactions with regard to the payment of these Balter-Regan notes? *A.* No, there were not.

Q. 282. The bank had closed at that time? *A.* The bank closed shortly after that.

Q. 283. What was the next thing that you had occasion to do or say with regard to your own note in the bank? *A.* I had renewed my own note in November, I think it was. That was not due at the time the bank closed.

Q. 284. Did you hear something further about it? *A.* About my note?

Q. 285. Was there any demand made upon you for it at any time? *A.* After the closing of the bank?

Q. 286. Yes. *A.* I don't think there was.

Q. 287. What was the next thing you heard about your situation there? *A.* Next thing I heard was the stock assessment.

Q. 288. Tell us about that. *A.* I received notice through registered mail of an assessment on my stock. Then a letter came in addressed to R. D. Mahoney, and that was also, I believe, on the assessment.

Q. 289. What did you do in consequence? *A.* I went down to see the Receiver then. His name was Cunningham, and I started to explain. I told him, "The note I have at the bank, my own legitimate notes, are going to be paid. My own stock assessment is going to be paid. I am going to pay the bank", and I started to explain about the other transaction, the note that started with Mr. Karnow and extended through me, and he said, "I don't want you to do anything like that. There have been a lot of irregular things going on at this bank. If I find anything wrong here I am going to have all you fellows up at the District Attorney's office." I don't remember anything more about it.

Q. 290. What was the next thing? *A.* The next thing I did was to speak to Mr. Lourie about it. He is sort of a business adviser.

Q. 291. After that? *A.* He wrote a letter to the next receiver, the new receiver.

Q. 292. Mr. Cunningham having died? *A.* Yes.

Q. 293. Who was appointed in his place? *A.* Mr. Brennan.

Q. 294. What, if anything, did you do after Mr. Brennan came in? *A.* We wrote a letter to Mr. Brennan and he wrote us back and said he wanted to have a conference with us about this.

Q. 295. Yes. *A.* We went down to see Mr. Brennan and we explained to him the whole story, started at the beginning and told him the whole thing all the way through and he said "It looks to me like you are out'. They can't hold you on that. I am going to recommend to Washington that that is my opinion."

Q. 296. Did you present the evidence to Mr. Brennan, in substance, everything that you have told here to the court? *A.* Yes, I did.

Q. 297. And the conversation, as I understand it, that you had with Mr. Brennan, was supplementary to the letter that you had previously sent to him relating to this matter? *A.* Yes.

Q. 298. There is one further thing in connection with this arrangement. What, if anything, was said as to what was to be done with, or become of the surplus stock left over in your hands after these notes had been met or taken care of? *A.* There was a small surplus; there was a surplus of a few shares that were to be returned to the bank after the next Regan note was taken care of. The bank had to work that out somehow.

Q. 299. Was that a matter of arrangement between you and somebody else? *A.* That was a matter of arrangement between Mr. Ulin and myself. Karnow's notes were accumulating interest, and the bank was adding interest to Karnow's notes. They would have to wash that out somehow; so he said he would get rid of it, and clear it up through some of the surplus shares.

Q. 300. I want to ask you, having in mind your testimony here of some days ago, was there any conversation between you and Balter and Regan and Ulin and Karnow about the substitution of Balter-Regan notes for the Karnow notes? *A.* No, there was not.

Q. 301. You appreciate and realize that you testified to that effect

when you were on the stand? *A.* Yes, I did. I don't think I quite understood. There was no such conversation.

Q. 302. At any stage did you and Karnow talk to Balter? *A.* Yes, we did.

Q. 303. Tell us what the conversation was. *A.* Mr. Karnow and I,—as I said before, every time I saw Karnow he would nag me about getting off the note. So I said, "Well, perhaps Balter can do something for us. Ulin has not done anything. Let's see what we can do with Balter." He and I went down to Balter's office and Balter said, "I guess I can get som body for you", and he did not get anybody. He promised to get somebody, but never did. We did not hear anything more about it. I called up Balter and said, "Have you done anything about that Karnow matter I asked about?" He said, "No, I can't find anybody to do that job. You better see Regan."

Q. 304. Can you tell us about when it was this talk took place between you, Balter and Karnow? *A.* That was shortly after the consolidation of the two banks.

Q. 305. That took place when? *A.* Sometime in January, 1931.

Mr. Gallagher. Unless I have overlooked something, your Honor, that is all.

Cross Examination.

X *Q.* 306 (by Mr. Aldridge). Mr. Greaney, I believe you testified you endorsed that stock? *A.* Yes.

X-Q. 307. You endorsed the name of R. D. Mahoney on it? *A.* Yes.

X-Q. 308. On certificate No. 929 for 100 shares of stock? *A.* I did.

X-Q. 309. On this certificate for fifty-seven shares, did you endorse that? *A.* The one that was split?

X-Q. 310. Yes. *A.* Yes, sir.

X-Q. 311. That was in the name of R. D. Mahoney? *A.* Yes, sir.

X-Q. 312. Did you make affidavit on May 22, 1934, with reference to the facts in this case? *A* I don't remember.

X-Q. 313. Do you know Edward Spencer? *A.* Yes.

X-Q. 314. Do you recall making an affidavit? *A.* Is this the affidavit?

X-Q. 315. Yes. A. Yes, I made that.

X-Q. 316. That is an affidavit made by you on May 21, 1934? A. I don't remember the date. That is evidently right.

X-Q. 317. Did that affidavit state the facts as you knew them at the time that you made it? A. I think it must have.

X-Q. 318. You would not make an affidavit of anything different, would you? A. No, I don't believe I would.

X-Q. 319. As stated in the affidavit, the facts were true? A. At that time.

X-Q. 320. And are now true? A. Well, I think I told the truth.

[Affidavit received in evidence as "Plaintiff's Exhibit 38".]

X-Q. 321. You testified that you got five hundred dollars from your counsel? From whom? A. From Regan and Balter.

X-Q. 322. And you kept the five hundred dollars yourself? A. Yes.

X-Q. 323. You also got additional collateral security of 150 shares Boston Continental Bank stock? A. Yes.

X-Q. 324. And you kept those, did you not? A. Yes.

X-Q. 325. Did you state Mr. Ulin had advised you that they had a number of shares of stock coming in on a draft from a Worcester bank? A. He did not put it that way.

X-Q. 326. How did he put it? A. He said they had a number of shares they were carrying in the bank as a cash item. He said they were thrown back on him from Worcester.

X-Q. 327. And that the National Bank Examiner was coming around to make an examination? A. He said they were in the bank at the time.

X-Q. 328. And they wanted to get them out? A. He wanted to get them out. Yes.

X-Q. 329. And he asked you to get them out for him? A. He asked me to help him out of the trouble; yes.

X-Q. 330. You were a director of the bank at that time? A. Yes.

X-Q. 331. Was that concealed from the National Bank Examiner? Did you ever disclose it to him? A. I never did.

X-Q. 332. Did you sign the statement which was forwarded to the

Comptroller of the Currency as one of the directors of the bank? Required by the National Banking Act. *A.* I don't remember.

Mr. Aldridge. If your Honor please, that will finish with Mr. Greaney for us. We want to ask the National Bank Examiner for a copy of that and we can get it in a few minutes.

Redirect Examination.

Q. 333 (by Mr. Gallagher). About this affidavit which Mr. Aldridge showed you, who prepared that affidavit? *A.* The attorney that I had at that time.

Q. 334. What was his name? *A.* James Yoffa.

Q. 335. Who else, if anybody, took part in the preparation of that affidavit? *A.* Mr. Lourie.

Q. 336. What is his relation to you? *A.* He is business counsellor.

Q. 337. And has been acting in that capacity to you for some time? *A.* Yes; a great many years.

Q. 338. Is Yoffa the attorney who collected the five hundred dollars on Regan-Balter note? *A.* Yes.

Q. 339. The same man? *A.* Yes.

Q. 340. And who received this Dennis trustee stock that has been put in evidence? *A.* Yes. Yoffa got that.

Q. 341. Had you told Mr. Lourie about the receipt of the five hundred dollars and the stock? *A.* Oh, yes. He knew all about it. He collected it.

Q. 342. Mr. Lourie, I say. *A.* Mr. Lourie knew all about that. Yes, I suppose so.

Q. 343. About that five thousand dollar note, I omitted to ask you, what has become of that? Do you know? *A.* The attorney had it originally and sent it back to me, and I suppose it is around somewhere. I haven't got it now.

Q. 344. Have you made a search for it and tried to find it? *A.* Yes. I have been unable to find it. I could not seem to locate it.

Q. 345 (by Mr. Stone). With the exception of the statement which you made to Mr. Karnow at the time when you asked him to go to the bank and sign a note, did you disclose any facts that you have disclosed today in connection with this transaction, to Karnow? *A.* No.

Q. 346. Did you ever disclose it to him? *A.* Not very many. I never said much to Mr. Karnow about it.

Q. 347. When Mr. Karnow accompanied you and you would go to Mr. Balter or to Mr. Regan, as you testified to, did you tell him then more than what you told him originally, viz. that the signing of the note would be an accommodation to you and also a favor to the bank? *A.* I told him that. Yes.

Q. 348. The conversations that you had with Balter and Regan regarding taking up of the Karnow note; who did all the talking, you or Karnow? *A.* Well, we both talked. But I talked more than Karnow on this case.

Q. 349. With the exception of Karnow's statement that he wants to go off the note and with the exception that you told him you would get some one that would help him out of this thing, did Karnow make any suggestions to you to take him into your confidence as to what you were going to do? *A.* No. He did not.

Q. 350 (by Mr. Gallagher). I take it from what you say that you did not inform Karnow about the Regan-Balter note transactions? *A.* About them buying the interest in the consolidation?

Q. 351. Yes. *A.* No. I never said anything about that to Karnow.

Q. 352. Or about your having some of the Regan and Balter notes? You never told him that? *A.* No. He knew I had one. That went with the note from my office when he took down the stock with him.

ALDRIDGE & FISK,
BRENTON K. FISK,
Attorneys for the Plaintiff-Appellee,
44 School Street, Boston, Mass.

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss.

Before me, a notary public in and for said Commonwealth, personally appeared Brenton K. Fisk, who is known to me and who, being by me first duly sworn, states under oath that he has served on the defendant-appellant the foregoing statement of additional testimony by duly mailing a copy thereof to his attorney-of-record, Daniel J. Gallagher, at 209 Washington Street, Boston, Massachusetts, the attorney's last known address. BRENTON K. FISK.

Subscribed in my presence and sworn to before me on this sixth day of October, 1938. ANNE M. CASHIN,
Notary Public.

EXHIBITS.

PLAINTIFF'S EXHIBIT 1.

Dec-12-1936 A. A. S.

Cunningham's Appointment (Adjudication of Insolvency)
Treasury Department

No. 11903

Office of Comptroller of the Currency
Washington, D. C., December 22, 1931.

Whereas, From information on file in this bureau, I am satisfied that "The Boston-Continental National Bank," located in the City of Boston, County of Suffolk, and State of Massachusetts is insolvent and unable to pay its just and legal debts:

Now, therefore, I, F. G. Awalt, Acting Comptroller of the Currency, in pursuance of the power and authority vested in me by law and under the provisions of Section 1 of an Act of Congress entitled "An Act authorizing the appointment of Receivers of National Banks, and for other purposes," approved June 30, 1876, do hereby appoint John B. Cunningham Receiver of "The Boston-Continental National Bank of ," with all the powers, duties, and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a Receiver.

In witness whereof, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this twenty-second day of December, A. D. 1931.

F. G. AWALT,
(SEAL) Acting Comptroller of the Currency.

PLAINTIFF'S EXHIBIT 3.

Deitrick's Appointment.

Treasury Department

No. 11903

Office of the Comptroller of the Currency

Washington, D. C., September 21, 1934.

Whereas, James H. Brennan was duly appointed and commissioned Receiver of "Boston-Continental National Bank", located in the City of Boston, County of Suffolk and State of Massachusetts on the fifteenth day of September, 1933, and whereas the said James H. Brennan has resigned to take effect at the close of business September 29, 1934.

Now, Therefore, I, J. F. T. O'Connor, Comptroller of the Currency, do hereby appoint Frederick S. Deitrick Receiver of "Boston Continental National Bank" to take effect at the close of business on the twenty-ninth day of September, 1934, in place of the said James H. Brennan, with all the powers, duties, and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a Receiver.

In Witness Whereof, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this twenty-first day of September, A. D., 1934.

J. F. T. O'CONNOR,

[SEAL] Comptroller of the Currency.

PLAINTIFF'S EXHIBIT 4.

Form 1924. MWF A

CERTIFICATE APPROVING CONSOLIDATION

Charter No. 11903 Consol. No. 423.

Treasury Department

Office of the Comptroller of the Currency

Washington, D. C., December 26, 1930.

Whereas, by satisfactory evidence presented to the undersigned, it has been made to appear that the directors and shareholders of The

Boston National Bank located in the City of Boston, in the County of Suffolk and State of Massachusetts, and the directors and shareholders of Continental National Bank of Boston located in the City of Boston, in the County of Suffolk and State of Massachusetts, have complied with all the provisions of an Act of Congress, entitled: "An Act to provide for the consolidation of National Banking Associations", approved November 7, 1918, as amended February 25, 1927.

Now, Therefore, I, J. W. Pole, Comptroller of the Currency, do hereby certify that The Boston National Bank and Continental National Bank of Boston have been consolidated under the charter of The Boston National Bank and under the corporate title of "Boston-Continental National Bank" with capital stock of One Million Dollars ($1,000,000) and that the consolidation is hereby approved. On the date of consolidation, the consolidated bank has one (1) branch, located in the City of Boston, which was a branch of The Boston National Bank and Which was in lawful operation on February 25, 1927.

In testimony Whereof, witness my hand and Seal of Office this twenty-sixth day of December, 1930.

J. W. POLE,
Comptroller of the Currency.

[SEAL].

PLAINTIFF'S EXHIBIT 5.

AGREEMENT OF CONSOLIDATION

This Agreement made between The Boston National Bank, a banking association organized under the laws of the United States, with capital stock of six hundred and twenty-five thousand dollars ($625,000.00) divided into 6,250 shares of one hundred dollars ($100.00) each, and Continental National Bank of Boston, a banking association organized under the laws of the United States, with capital stock of five hundred thousand dollars ($500,000.00) divided into 5,000 shares of one hundred dollars ($100.00) each, each located in the City of Boston, State of Massachusetts, and each acting pursuant to a resolution of its Board of Directors and by a majority of said Boards, pursuant to the authority given by, and in accordance with the provisions of, an Act of the Congress of the

United States entitled "An Act to provide for the consolidation of National Banking Associations", approved on the 7th day of November, 1918, witnesseth as follows:

Section 4.

Of the capital of the consolidated bank, 22,500 shares shall be allotted to the present shareholders of The Boston National Bank, being 3.6 shares of twenty dollars ($20.00) par value for each share of one hundred dollars ($100.00) par value now held by them, and 17,500 shares shall be allotted to the present shareholders of Continental National Bank of Boston, being 3.5 shares of twenty dollars ($20.00) par value for each share of one hundred dollars ($100.00) par value now held by them, and 10,000 shares, the balance of such authorized capital, shall be sold for cash.

The Boston National Bank

Certificate

No 1236

100 Shares

Issued to

Thomas E. Greaney

Dated June 30 1930

Transferred

Paid Rec

Dated 1/1/47 19 29

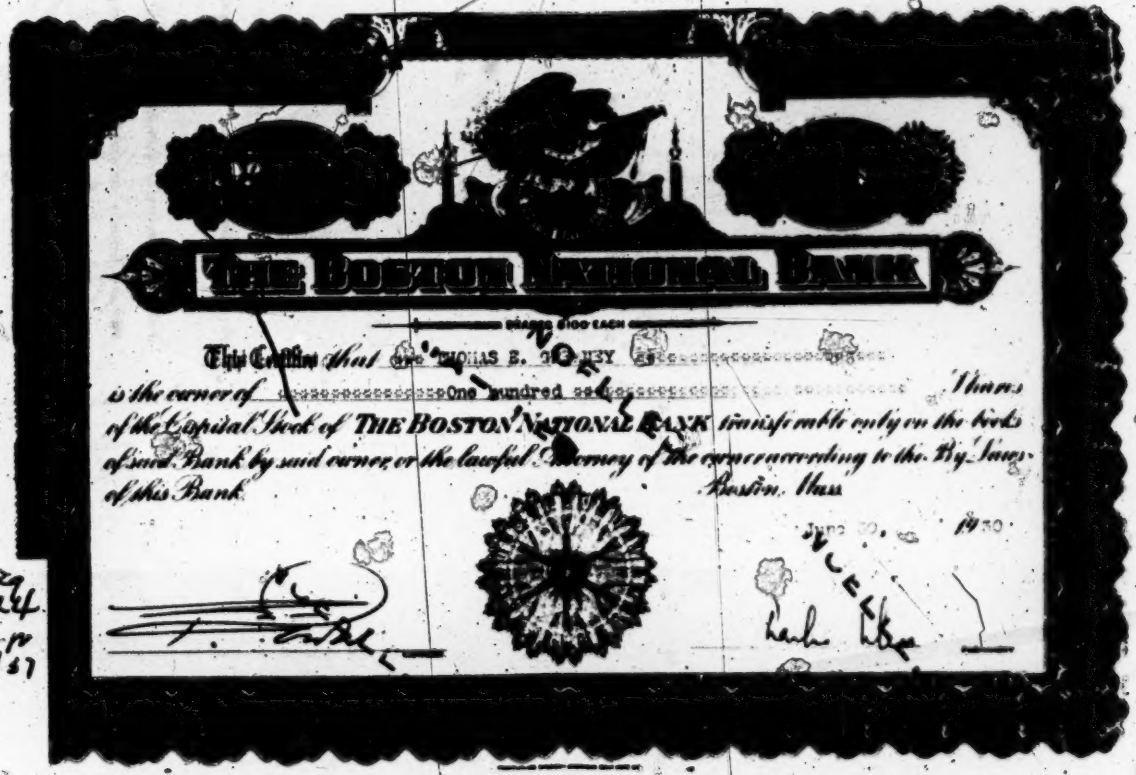
No. Original Certificate	No. Original Shares	No. of Shares Transferred
484	100	100

4111 29
1/8 ex 24
Filed pp
(Greaney's Record) 11/9/87

BNB Co

1236, 1237

Stub [illegible]



67

3-50
1-40
NIMON KARNOW
116 BEDFORD ST

For Value received, I do hereby sell, assign and transfer unto

_____

_____

_____

_____ Three

of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint _____

_____ Attorney

to transfer the said stock on the books of the within named Bank with full power of substitution in the premises.

Dated July 1st 1950 19

In Presence of Edward T. Cheever

11/9/37

RE: THOMAS E. GREANEY -- R. D. MAHONEY

Certificates Surrendered	No. Shares	Name of	Date	Certificates Issued	No. Shares	Name of
949	100 B.N.B.	Reed & Co.	6/30/30	1836 B.N.B.	100	Thomas E. Greaney
972	8	Reed & Co.		1837	80	Thomas E. Greaney
1147	11	Reed & Co.				
1210	80	Ada Albert				
1161	11	Ada Albert				
1208	80	Ada Albert				
1208	10	Ada Albert				
1204	8	Ada Albert				
1809	10	Bright, Sears & Co.	7/10/30	1840	10	Thomas E. Greaney
	190				190	
1834	100 B.N.B.	Thomas E. Greaney	10/19/30	1898 B.N.B.	100	Hiram Harrow
1837	80	Thomas E. Greaney		1896	80	Hiram Harrow
1840	10	Thomas E. Greaney		1897	10	Hiram Harrow
	190				190	
1894	80 B.N.B.	Hiram Harrow	2/12/31	706 B.C.N.B.	100	Joseph Salter
1897	10	Hiram Harrow		707	100	Joseph Salter
	90			708	26	Joseph Salter
				709	97	Hiram Harrow
90 shs. B.N.B. equal to				256	.8	Joseph Salter
324 shs. B.C.N.B. on basis				257	.2	Hiram Harrow
3.6 for each B.N.B.					324	
1898	100 shs. B.N.B.					
	equal 360 B.C.N.B.	Hiram Harrow	5/ 6/31	929	100	R. D. Mahoney
709	97	Hiram Harrow		930	100	R. D. Mahoney
257	.8	Hiram Harrow		931	100	R. D. Mahoney
	457.8			932	100	R. D. Mahoney
				933	57	R. D. Mahoney
				311	.8	R. D. Mahoney
					457.8	
935	57	R. D. Mahoney	9/10/31	1083	37	R. D. Mahoney
				1084	20	R. D. Mahoney
	57				57	

R. D. Mahoney assessed 457.8 shares @ $20. per - $9,144.00

Remarks: Pencil notation on [illegible] stub "Sailed 5/7 to Thos. E. Greaney 929 thru 933".

717

69

Statement of account

Mr. T. E. Greaney
40 Old Colony Road,
Chestnut Hill,
E-M Newton, Mass.

In account with
THE NATIONAL
SHAWMUT BANK
OF BOSTON

CHECKS PAID	DEPOSITS	BALANCE
		JUL 1 80 2,364.7
23203.14-	JUL 15 80 23,203.14	JUL 1 80 25,567.9
		JUL 3 80 2,364.7
	JUL 15 IN 2.96	JUL 15 IN 2,367.7

BOSTON, MASS. 6/30 1930 SHAWMUT No.

THE NATIONAL BANK OF BOSTON 8-12

PAY TO THE ORDER OF T. E. Greaney $23203.14

DOLLARS

174 JUL 31 1930 174

NATIONAL BANK

KEY

C — Certified Check
M — Credit Memo
DV — Deposit containing uncollected items
M — Debit Memo
C — Error Correction

Ex — Exchanges (Clearing)
In — Interest
LST — List of Checks
OD — Overdrawn
RT — Returned Item

IF NO ERROR IS REPO
ACCOUNT WILL BE

Greaney account
National Shawmut
Old 2/-30-30

PLAINTIFF'S EXHIBIT 38.

AFFIDAVIT

In Re: Boston Continental National Bank and Thomas E. Greaney

I, Thomas E. Greaney, of Boston, County of Suffolk, Commonwealth of Massachusetts, under oath do make the following statements as to the facts concerning the note now dated November 3, 1931 in the sum of $14,533.66, now held by the Receiver of the Boston Continental National Bank and certain certificates of Boston Continental National Bank stock standing in the name of R. D. Mahoney.

On or about the latter part of June, 1930, the President of the Boston National Bank, Charles Ulin, informed me in substance that it was imperative that the Boston National Bank immediately take up a matter which was called a cash item that the Bank had carried for a length of time. He suggested that I interest some manufacturer or wholesaler in my district to negotiate a loan at the Bank for the purpose of taking up this cash item and that the Bank would turn over to him the Bank stock securing the cash item, and that the matter would be cleared up in a short time. Mr. Ulin had tried to get some one to do so but had not succeeded. This transaction was to be an accommodation for the Bank.

I interested one N. Karnow to do this for the Bank, and on June 28, 1930 he executed a note in the sum of $23,500 in favor of the Bank, the proceeds of the discount of this note amounting to $23,203.14 was deposited by Mr. Karnow to my account in the National Shawmut Bank of Boston on July 1, 1930, as he felt that the money did not belong to him, and I issued my check dated June 30, 1930 in favor of the Boston National Bank in the above sum, which check was cleared on July 3, 1930.

On or about December 1, 1930, Tirrell M. Ragan and Joseph Balter entered into an arrangement with Charles Ulin by which they were to buy a large block of shares of the Boston National Bank. The stock held by Mr. Karnow unbeknown to him was part of the shares concerned. As a result some of the stock held by Mr. Karnow was sur-

rendered to Ragan and Balter and on March 11, 1931 the proceeds $9,500 was applied towards the payment of the Karnow note.

On May 4, 1931 at the request of Mr. Karnow, I substituted my note, which was from time to time renewed and now is dated November 3, 1931 in the sum of $14,533.66. This note was discounted by the Bank and the proceeds deposited with the Karnow account charged against the said note of Mr. Karnow, and his note returned to him.

Neither Mr. Karnow nor myself have received any benefit from this transaction which was done purely as an accommodation for the Bank. Therefore I should not be held liable on a note in the sum of $14,533.66 bearing my personal signature as represented by asset 1025G.

Witness my hand and seal this 21st day of May, 1934.

THOMAS E. GREANEY.

Commonwealth of Massachusetts

Suffolk, ss. Boston, May 21, 1934.

Then personally appeared the above-named Thomas E. Greaney to me personally known, and under oath declared that the statements by him made are true to his best knowledge and belief.

[SEAL] Edward T. Spencer

DESIGNATION OF CONTENTS OF RECORD ON APPEAL OF DEFENDANT GREANEY TO THE CIRCUIT COURT OF APPEALS.

[Filed September 28, 1938.]

1. Amended bill of complaint.
2. Answer of defendant Greaney to said amended bill of complaint.
3. Defendant's motion to transfer cause to law side of court under Equity Rule No. 22, together with the ruling or order therein and the defendant's exception thereto.
4. The opinion of the court, with order for decree.
5. Final decree.
6. Appellant's condensed statement of testimony.
7. Portion of transcript of testimony of defendant Greaney, given at trial on December 10, 1937, as stenographically reported, being pages 8, 9, and part of page 10, of said testimony.

8. Plaintiff's Exhibit No. 38.

9. Appellant's concise statement of the points on which he intends to rely.

DANIEL J. GALLAGHER,
Attorney for THOMAS E. GREANEY, *Appellant.*

9/29/38. I Daniel J. Gallagher, attorney for said appellant, hereby certify that on September 28, 1938, I served upon Messrs. Aldridge and Fisk, attorneys for Frederick W. Deitrick—receiver appellee a true copy of within designation together with concise statement of points relied on by said appellant by mailing same postage prepaid, to said attorneys at 44 School Street, Boston, Massachusetts.

DANIEL J. GALLAGHER,
Attorney for THOMAS E. GREANEY, *Appellant.*

PLAINTIFF-APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF THE EVIDENCE.

[Filed October 6, 1938.]

The plaintiff, being the appellee herein, designates additional portions of the evidence to be included in the record on appeal, as follows:

1. The plaintiff-appellee's statement of the testimony duly filed herewith, and all such portions of the testimony of Nimon Karnow (erroneously spelled C-a-r-n-o by the reporter) and Thomas E. Greaney, in question and answer form, as are set forth therein.

2. The stipulation filed on or about June 8, 1935.

3. Plaintiff's exhibits as follows:

No. 1. Determination of insolvency (omitting certification).

3. Plaintiff's appointment (omitting certification).

4. Certificate of Consolidation (omitting certification).

5. Agreement of Consolidation (include only introductory paragraph and the first sentence of section 4).

24. Stock certificates and stubs, 1236, 1237 and 1240 (reproduce front and back of only one of the three).

25. Tabulation of defendants' stock transactions (reproduce in reduced size by planograph or similar process).

33. Photostat of account and check (reproduce in reduced size by planograph or a similar process).

Pursuant to Rule 75, Federal Rules of Civil Procedure, a statement of the above-designated testimony is herewith filed.

ALDRIDGE & FISK,
BRENTON K. FISK,
Attorneys for Plaintiff-Appellee.
44 School Street, Boston, Massachusetts.

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss.

Before me, a notary public in and for said Commonwealth, personally appeared Brenton K. Fisk, who is known to me and who, being by me first duly sworn, states on oath that he has served the foregoing designation on the appellant, Thomas E. Greaney, by duly mailing a copy thereof to his attorney-of-record, Daniel J. Gallagher, at 209 Washington Street, Boston, Massachusetts, the last-known address of said attorney. BRENTON K. FISK.

Subscribed in my presence and sworn to before me, this sixth day day of October, 1938. ANNE M. CASHIN,
Notary Public.

CONCISE STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY.

[Filed September 28, 1938.]

1. The court having found as a fact that the Karnow note was given as an accommodation to the bank, for its benefit, and that the Greaney note was a substitute for the Karnow note, the Greaney note was without consideration and purely an accommodation for the bank, and is not enforceable against him, notwithstanding that he was, at the time, a director of the bank.

2. The court having found as a fact that the Karnow note was part of a scheme by the bank to conceal its illegal act, and the Greaney

note was a substitute therefore, the Greaney note is unenforceable because of illegality.

3. The court having found that the Karnow note was an acccommodation to the bank and part of a scheme by the bank to conceal its illegal act, the Greaney note having been given in substitution for the Karnow note, the Greaney note is unenforceable because of illegality.

4. The court found as a fact that the bank throughout, controlled the stock, treating it as owner, and at most pledged it as security, wherefore the bank at no time in fact parted with its ownership.

5. There is no evidence to support the finding that the defendant Greaney held himself out to the bank, or to the public, or to anyone, as owner of the stock either in his own name or in the name of R. D. Mahoney.

6. There is no evidence to support the finding that Greaney at the time of the substitution of the Greaney note for the Karnow note in May of 1931, became the owner of the stock.

7. This cause is clearly distinguishable from *Lyons* v. *Westwater,* 181 Fed. 68, and the ruling therein is not applicable to the facts in this case.

8. This is not an action against a director for violation of his duty as a director either under the Statutes or under the Common Law.

9. The receiver-plaintiff here has no greater rights, on the facts properly found, to recover on this note, than the bank could have had; since the bank could not have enforced any claim based on the Greaney note.

10. The plaintiff, although informed for a considerable time prior to commencement of this suit, of the facts substantially as found by the court (see Plaintiff's Exhibit 38), so constructed his bill of complaint, that the defendant could not properly and effectually move *in limine* to transfer the action to the law side of the court, under Equity Rule No. 22; for the reason that such motion would not then lie, but the defendant did so move within reasonable time after the plaintiff's case had been completely disclosed to the court. The court, therefore, erred in denying the defendant's motion with the resultant denial of the defendant's right to a trial by jury.

11. The Circuit Court of Appeals on its own motion has power to order the transfer to the law side of the court under Equity Rule 22, so that the defendant may exercise his constitutional right to a trial by jury.

DANIEL J. GALLAGHER,
Attorney for Appellant THOS. E. GREANEY.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the record on the appeal of Thomas E. Greaney, defendant, including true copies of such proofs, entries and papers on file as have been designated in the designation of contents of record on appeal of defendant Greaney to the Circuit Court of Appeals in the cause entitled,

NO. 4114, EQUITY DOCKET,
FREDERICK S. DEITRICK, RECEIVER BOSTON-CONTINENTAL NATIONAL BANK, PLAINTIFF,
v.
THOMAS E. GREANEY, NIMON KARNOW AND R. D. MAHONEY, DEFENDANTS,

in said District Court determined.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this thirteenth day of December, A. D. 1938.

[SEAL] JAMES S. ALLEN, *Clerk.*

[MEMORANDUM: Orders of enlargement of time to and including December 14, 1938, are here omitted. A. I. CHARRON, *Clerk.*]

PROCEEDINGS IN CIRCUIT COURT OF APPEALS.

On January 6, 1939, this cause came on to be heard, and was fully heard by the court, Honorable George H. Bingham and Honorable Scott Wilson, Circuit Judges, and Honorable Elisha H. Brewster, District Judge, sitting.

Thereafter, to wit, on March 25, 1939, the following Opinion of the Court was filed:

OPINION OF THE COURT.

March 25, 1939.

WILSON, J. This is an appeal from a decree in equity by the District Court of Massachusetts in favor of the Receiver of the Boston-Continental National Bank, a national banking association located in Boston in the Commonwealth of Massachusetts, holding the defendant-appellant liable on a note signed by him, amounting to $14,553.66, and a part of the assets of the closed Boston-Continental National Bank, and also holding the defendant-appellant liable on an assessment by the United States Comptroller of Currency against him for $9,144 as the owner of 457.2 shares of stock of said closed bank.

The facts are as follows: Early in 1930 the Boston National Bank, in violation of the National Banking Act, 12 U. S. C. A., Sec. 83, purchased 190 shares of its own capital stock. In order to conceal this unlawful act and to deceive the National Bank Examiner, the president of the bank and Greaney, one of its directors, induced one Karnow, a small depositor in the bank, to execute and deliver to the bank for its accommodation, as the District Court found, his note for $23,500.

Karnow's note was discounted by the bank and the proceeds were deposited in another Boston bank to the credit of Greaney. Greaney then drew his check against this fund in favor of the Boston National Bank and the 190 shares of its capital stock were transferred on its books to him.

Karnow, when his note became due, was prevailed upon, against his better judgment, to renew it, and shortly thereafter the stock

standing in Greaney's name was transferred on the books of the bank to the name of Karnow and he took possession of them. The District Court found that at no time did Karnow intend to become the owner of the bank stock, but he eventually had the stock transferred to his name as security while his note was held by the bank.

In September, 1930, a consolidation of the Boston National Bank and the Continental National of Boston was effected, under the name of the Boston-Continental National Bank. The 190 shares of the National Bank then standing in Karnow's name were converted into 684 shares of the capital stock of the consolidated bank of the par value of $20 per share.

Two men by the name of Ragan, president of the Continental National Bank, and Balter, an officer of that bank, were instrumental in bringing about the consolidation of the Boston National and the Continental National Bank, and to carry out their plan it was necessary to acquire considerable stock of the Boston National Bank.

Three notes of Ragan and Balter amounting to $24,000 were delivered to Greaney with instructions to apply the proceeds to the Karnow note and to obtain from Karnow the 190 shares of the Boston National Bank stock.

It is unnecessary to outline in detail the various steps in the financial life of the Boston-Continental National Bank under the guidance of Ragan and his co-directors, so far as it relates to the 190 shares of stock and the notes given in connection therewith by Ragan and Balter, prior to the closing of its doors by the Comptroller of Currency in December, 1931. It is sufficient to say that the first note of Ragan and Balter for $9,500 came due in March, 1931, which was paid, and pursuant to an understanding with Karnow 226.8 shares of stock of the Boston-Continental National Bank was released by Karnow and he was credited on the books of the bank with a payment of $9,500 on his note of $23,500.

In May, 1931, due to the repeated insistence of Karnow, the Boston-Continental National Bank agreed to surrender Karnow's

note given to the Boston National Bank, and it was arranged to substitute Greaney's note to the Boston-Continental National Bank for $14,553.66, representing the unpaid balance of the Karnow note. At the same time the remainder of the stock standing in Karnow's name was surrendered to Greaney and was registered on the bank's books in the name of one Mahoney, a son-in-law of Greaney, but without Mahoney's knowledge or consent.

Upon the closing of the doors of the Boston-Continental National Bank, a receiver was appointed, and on July 11, 1932, an assessment was made by the United States Comptroller of Currency against all stockholders of the bank equal to the par value of their stock. The assessment on the shares of stock standing in the name of Mahoney has never been paid and this equity suit was originally brought against the three defendants, Greaney, Mahoney and Karnow, to determine the ownership of the shares and the liability of the owner or owners.

The District Court found as facts that Karnow, when he gave his note to the Boston National Bank upon the urging of Greaney and its president, and took the stock of the bank in his own name, had no intention of becoming the purchaser of the stock, and that it was also understood that his note was given solely "to accommodate the bank," and to conceal the unlawful purchase of the stock by the bank. The court also found that when Greaney's note was given in May, 1931, it was substituted for that of Karnow's, and Karnow was released thereon, and the stock of the bank standing in the name of Karnow was transferred to Greaney. While it was agreed at that time that Greaney "should take the stock on the same terms that Karnow held it" the District Court held that Greaney thereby became the owner of the stock, although he had it registered in the name of Mahoney. It cannot be denied that the entire transactions to cover up the unlawful proceedings by the Boston National Bank, or by its officials in relation to this stock, were unlawful.

The pertinent points on which the appellant relies are stated in accordance with Rule 36 of this court (1939):

"1. The court having found as a fact that the Karnow note was given as an accommodation to the bank, for its benefit, and that the Greaney note was a substitute for the Karnow note, the Greaney note was without consideration and purely an accommodation for the bank, and is not enforceable against him, notwithstanding that he was, at the time, a director of the bank.

"2. The court having found as a fact that the Karnow note was part of a scheme by the bank to conceal its illegal act, and the Greaney note was a substitute therefor, the Greaney note is unenforceable, because of illegality.

"3. The court having found that the Karnow note was an accommodation to the bank and part of a scheme by the bank to conceal its illegal act, the Greaney note having been given in substitution for the Karnow note, the Greaney note is unenforceable, because of illegality."

"8. This is not an action against a director for violation of his duty as a director either under the statutes or under the common law.

"9. The receiver-plaintiff here has no greater rights, on the facts properly found, to recover on this note than the bank could have had; since the bank could not have enforced any claim based on the Greaney note."

"11. The Circuit Court of Appeals on its own motion has power to order the transfer to the law side of the court under Equity Rule 22, so that the defendant may exercise his constitutional right to a trial by jury."

The appellant contends that the District Court erred in ruling that the defendant Greaney was liable on his note of $14,553.66, and also on the assessment against him upon the stock standing in the name of Mahoney in the additional amount of $9,144, as claimed by the appellee, and in support of his contention submits the following propositions of law:

I. Whether the receiver of a closed national bank may recover from the maker of an accommodation note given to the bank, at its request, and taken by the bank for the purpose of concealing its ownership of shares of its own stock previously acquired by it in violation of law.

II. Whether the receiver of a closed national bank may recover a stock assessment from one who holds stock registered in the

name of another as security against his promissory note given to the bank for its accommodation and to enable it to conceal its illegal ownership of said stock.

The possible injury to the bank and any potential detriment to its creditors was occasioned by the purchase of the stock by the Boston National Bank. Under these circumstances, it is submitted, the law is clear that the maker of a note may set up as a defense that such a note was given for the accommodation of the bank, and instead of the maker being precluded from asserting the defense by reason of his participation in such an illegal enterprise, a receiver of a closed bank is not permitted to enforce payment because of the bank's participation in the unlawful acts. *Rankin, Receiver,* v. *City National Bank,* 208 U. S. 541, 546.

All the cases bearing upon the liability of the maker of such a note given to a national bank for its accommodation, to enable it to conceal from a national bank examiner and the Comptroller of Currency its true financial condition, we think establish the following propositions:

"(1) the maker of such a note may set up lack of consideration as a defense;

"(2) participation by the maker and the bank acting through its officials in such an illegal transaction does not aid the bank's receiver in a suit to recover on such a note, but precludes recovery by him;

"(3) in a suit to recover on such a note the receiver of the bank is in no better position than the bank itself would have been."

In *Yates Center National Bank* v. *Lauber,* 240 Fed. 237, pursuant to an arrangement to help the officers conceal the financial condition of the bank, the bank turned over certain worthless notes to the defendant for his note, and agreed that it would at any time accept them in satisfaction of his note. The court refused to hold the defendant liable, saying:

(Page 238) ". . . the illegality of the entire matter so clearly appears as to prevent a court of justice from affording any relief based thereon."

In *Cutler* v. *Fry,* 240 Fed. 238, the defendant was induced to

give his note in exchange for the president's note, to help conceal defalcations of the president, under an agreement that the bank would at any time take the president's note in payment of the defendant's note. The court held that lack of consideration was a defense, and said:

(Page 239) "However, the rights of the receiver of the bank to recover on the note in question rise no higher than the rights of the bank had insolvency not intervened. . . . but in the hands of the original payee or its receiver, as in this case, both the note and the contemporaneous agreement constituted the entire contract between the parties, and, when the agreement thus formed is presented, the illegality of the whole matter so clearly appears the court will leave the parties where it finds them by refusing all relief. *Rankin* v. *City National Bank*, 208 U. S. 541; *McMullen* v. *Hoffman*, 174 U. S. 639."

In *Yates Center National Bank* v. *Schaede*, 240 Fed. 240, affirmed without opinion by the Circuit Court of Appeals for the Eighth Circuit (240 Fed. 241), the court refused to enforce a note given to a bank without consideration to conceal the defalcations of its president, saying:

(Page 240) "Not only is this defense (*want of consideration*) made out, but it further appears that the whole transaction, from the making of the original note to the renewal in controversy, was without consideration, and in pursuance of the illegal and criminal design of the president of the bank. Such state of facts, public policy and good morals alike condemn, and courts refuse to enforce."

In *Andresen* v. *Kaercher*, 38 Fed. (2d) 462, 464 (C. C. A. 8), the bank had a claim against the estate of one Kaercher and entered into an agreement with the defendants whereby the defendants deeded certain real estate to the bank (which was to be sold as soon as possible) and gave to the bank accommodation notes so that the bank might be able to show them as assets until the real estate should be sold. The trial court directed a verdict for the defendants, and this decision was affirmed on appeal.

The court answered the argument that the defendants had

been guilty of a concerted attempt to deceive the national bank examiner and the Comptroller of Currency as to the exact financial condition of the bank in the following language:

(Page 464) "But, be this as it may, the result is not affected, because the court will not lend its assistance in any way towards carrying out an illegal contract, nor will it enforce any alleged rights directly springing from such a contract. *McMullen* v. *Hoffman*, 174 U. S. 639. In this view the bank itself could not have collected, nor is the receiver more advantageously situated."

In the case of *Rankin, Receiver* v. *City National Bank*, 208 U. S. 541, the president of a bank arranged with the defendant bank to discount his individual note and deposit the proceeds to a special account in the name of his bank (the Guthrie Bank) under an arrangement whereby these funds were not to be drawn against, but were to remain with the City National Bank until the note was paid. The purpose of this transaction was to effect a reduction of certain loans to which the examiner had objected as excessive. The president gave his bank a check on the City National Bank, the amount of which was credited to his personal account, and on the same day he gave his bank a check on his personal account, which was credited to bills receivable and the objectionable notes were taken out of the bank's assets. The receiver of the Guthrie Bank sued to recover the deposit to its credit which the City National Bank had offset against the note held by it on the day that the Guthrie Bank closed. It was agreed by the parties that the transaction between the banks was not illegal, but in affirming a decision in favor of the defendant bank, the court enunciated certain well-defined principles in the following language:

(Page 545) ". . . the whole business, from beginning to end, was and was intended to be a mere juggle with books and paper to deceive the bank examiner. The City Bank never received anything from the Guthrie Bank, the Guthrie Bank never parted with anything to the City Bank, or with anything for the loss of which the City Bank is responsible, if it parted with anything at all."

(Page 546) "As between the banks no one got any money, and the only benefit of the loan in fact or contemplation was a swindle upon the bank examiner. . . . If the Guthrie Bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank."

Also see *Petersen* v. *Tillinghast*, 192 Fed. 287 (C. C. A.); *Deitrick* v. *Standard Surety & Casualty Co.*, 90 Fed. (2d) 862, 865.

The foregoing authorities, it is submitted, establish the rule that, where a note is given to a national bank without consideration and for its accommodation to conceal its true financial condition from a national bank examiner or the Comptroller's office, the maker may set up the defense of lack of consideration as against the receiver of a closed national bank. In an action by the receiver the courts will not enforce a note given as part of such an illegal transaction by the bank. Appointment of a receiver does not absolve such a note of the taint of illegality. His rights are in no way superior to the rights of the bank, and the time-honored principle denying enforcement of illegal obligations holds. The receiver is therefore barred from recovery on Greaney's note.

A different situation, however, exists where the receiver of a closed national bank undertakes to collect an assessment by a Comptroller against a person permitting stock of a bank to stand in his name on the books of the bank, or in the name of another for his benefit.

While neither a bank nor a receiver can collect a note given and accepted by the bank to deceive a national bank examiner as to an unlawful purchase of the bank's own stock, a suit by a receiver to collect an assessment by the United States Comptroller on the stock of the bank stands on a different footing. Such an assessment is lawful. It is independent of any method by which the stockholder acquired the stock. It is authorized by the National Banking Act, 12 U. S. C. A. 191, 192, and falls on every person who in law may be treated as the owner of the stock.

The assessment in this case was not made pursuant to any unlawful acts by the officers of the bank, in which they partici-

pated, *Trustees of Somerset Academy* v. *Picher*, 90 Fed. (2d) 741, 744. Any judgment recovered on an assessment is not for the benefit of the bank, but is for the benefit of creditors of the bank. *Dunn et al.* v. *O'Conner et al.*, 89 Fed. (2d) 820, 826; *Page* v. *Jones*, 7 Fed. (2d) 541, 544, cert. denied, 269 U. S. 587. It appearing that there are insufficient assets to discharge the liabilities of a closed national bank, the Comptroller of Currency under the provisions of the National Banking Act, may assess against each owner of a share or shares of the outstanding stock of a closed bank, or against any person whom the law regards as standing in the relation of owner, a sum, not exceeding the par value of such stock, which in the aggregate shall be sufficient to discharge the liabilities of the bank. R. S., Sec. 5151, as amended by Sec. 23, 38 Stat. 273; also see 12 U. S. C. A., Secs. 63 and 64, 191, 192; *Harper* v. *Moran*, 76 Fed. (2d) 980, 982.

Whether Karnow would have been liable for the assessment if the Boston-Continental stock had been standing in his name at the time of the assessment is immaterial, as his shares of stock, prior to the assessment, had been lawfully transferred to Greaney, who had them registered in the name of his son-in-law, Mahoney, and they remained in Mahoney's name on the books of the bank until this suit was brought. Mahoney, when he learned what had been done, denied all knowledge of it, and the judgment in this case freed him and also Karnow of all liability on the assessment, *Finn* v. *Brown*, 142 U. S. 56.

When Ragan and Balter sought to purchase shares of the Boston National Bank stock in order to carry through their plan for the consolidation of the Boston National Bank and the Continental National Bank, after some preliminary negotiations, they signed three notes in the total principal amount of $24,000, which were given to Greaney to discharge any obligation Karnow had assumed by giving his accommodation note to the bank and to acquire for them the shares standing in the name of Karnow, which it was originally suggested should be held as security for his note given to the Boston National Bank and which was found among the assets of the consolidated banks.

When the first of the three notes came due, Ragan and Balter notified Greaney to have Karnow deliver up sufficient shares of the Boston-Continental National Bank stock to represent the face of the due note, *i. e.*, $9,500, at the price agreed upon between Ragan and Balter and Ulin and Greaney. Karnow, thereupon, on payment of the note, surrendered 226.8 shares of the Boston-Continental stock, which was turned over to the bank, or Ragan and Balter, and Karnow received credit at the bank on his note for the amount.

Karnow then insisted that he be relieved of further responsibility, if any, on the balance of his accommodation note held by the bank, and it was finally arranged with Greaney and the bank, through Ragan and Balter, that Greaney would take over the balance of the Karnow note of $14,553.66; whereupon Greaney signed a new note to the bank for that amount and the Karnow stock was delivered to Greaney, who had the stock transferred directly into the name of his son in-law, Mahoney, but, as stated above, without Mahoney's knowledge or consent.

Greaney now held two notes of Ragan and Balter for which he had agreed to transfer to them, when paid, the remaining 457.2 shares of Boston-Continental stock formerly held by Karnow, though now registered on the books of the bank in the name of his son-in-law, Mahoney, and on payment of which the note given by Greaney in discharge of Karnow's note would be cancelled. Ragan and Balter would then presumably have acquired the stock which they coveted, and Greaney would be relieved of any liability on his note given to remove Karnow's name from any paper held by the bank.

The District Court held that as to the assessment by the Comptroller, Greaney must be regarded as the beneficial owner of this stock. We think that he stood in that relation as to the receiver suing to collect an assessment by the Comptroller. Having registered the stock in Mahoney's name, without Mahoney's knowledge, Greaney cannot thereby in this suit escape any liability that would follow if the stock was registered in his own name. Greaney cannot now deny whatever liability followed from permitting the

stock to remain on the books of the bank in the name of Mahoney for his benefit.

When the second note of Ragan and Balter came due, Greaney signed a transfer of some of those shares standing in Mahoney's name without consulting Mahoney, and delivered to the bank certificates for the stock to be delivered to Ragan and Balter in consideration of the payment of their second note. On their failure to make payment for the note, the certificates were redelivered to Greaney. He then brought suit on their note. We think there was sufficient evidence to warrant the District Court in holding that Greaney, with respect to the assessment against him, and after the giving of the Ragan and Balter notes and transfer of the stock to him, had control over this stock.

But, assuming that the stock resulted from the unlawful transaction between him and the Boston National Bank by which Karnow was prevailed on to give his accommodation note to the bank, and that these shares of stock were turned over to Karnow as security for the note which he had given to the bank, and that Greaney took the stock and note from Karnow as an accommodation note with whatever defects or defenses Karnow might have had as against the bank, we are not now considering a claim of the bank or its receiver based on Greaney's note, but as against a Comptroller's assessment and a suit by a receiver to collect it. Greaney could not rely on any defenses he or Karnow might have had against the receiver in a suit on the note originally given to the bank as an accommodation and without consideration. If Karnow had held the stock registered in his name after the assessment was made, he might have been liable for the assessment as the owner of the stock, but Karnow had previously transferred it in good faith to Greaney. By Greaney's order it was registered in the name of his dummy, Mahoney, but in equity it is regarded as though registered in Greaney's own name.

Greaney's status in the suit by the receiver to collect the assessment is not affected by his participation in the unlawful transaction between him, Ulin and the Boston National Bank. The Comptroller was not a party to any unlawful transaction. On

this branch of the case Greaney is not sued on his note by a party equally guilty as himself of unlawful acts. The imposition of the liability for the assessment of the Comptroller is statutory and is independent of any liability of Greaney on his note or lack of it. Greaney as against the lawful acts of the Comptroller could not set up as a defense an unlawful transaction in which he participated, but in which the Comptroller did not participate. When Greaney again finally acquired this stock, he had it registered in the name of a dummy who appeared on the books of the bank as the owner. The question is, can Greaney, under these circumstances, deny ownership of this stock in the action by a receiver of a closed national bank to collect an assessment by a Comptroller? We think not.

The agreement with Ragan and Balter was a new and independent transaction, which, so far as appears in the record, has nothing to do with the method by which Greaney, or Karnow, acquired the bank stock. Ragan and Balter wanted the stock standing in Karnow's name to carry through their plan of consolidation of the two banks. They entered into what appears to be a legitimate transaction with Greaney to acquire for them the stock standing in Karnow's name, agreeing to pay therefor an adequate price, which would also have enabled Greaney to discharge his note given as a substitute for Karnow's. Notes of Ragan and Balter were delivered to Greaney, from the proceeds of which as they came due and on the delivery of the stock he was to discharge Karnow on his note at the bank. Greaney, to satisfy Karnow, arranged to take over the balance of Karnow's note, for which he was, at least, morally responsible.

In effect, under such circumstances, the law regards the stock registered in the name of his dummy, Mahoney, as standing in the name of Greaney. Greaney allowed it to remain in Mahoney's name on the books of the bank. Equity will not permit Greaney to escape liability by such a subterfuge.

The authorities are in accord that the beneficial or actual owner of the stock is liable for an assessment by the Comptroller, the stock being registered in the name of another.

In *McCandless* v. *Haskins et al.*, 28 Fed. (2d) 693, 694, the court said:

"Some contention is made by plaintiff that the bank was without power to purchase its own capital shares. While this may be true, yet that is not the decisive question in this case. The plaintiff charged in its petition the defendants owned the shares in question, and, because they owned the same, were liable for the assessment."

The general rule covering the liability of stockholders is stated in *Welles* v. *Larrabee*, 36 Fed. 866, 869:

"The liability sought to be enforced is purely statutory, and the declaration of the statute is that 'the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein at the par value thereof,' etc. Section 5151, Rev. St. (now 12 U. S. C. A., Sec. 64.) To be liable, the party charged must be a shareholder, and by the construction placed upon these and similar provisions in other statutes it is held that the actual shareholder cannot escape liability by placing the legal title of his shares in the name of a third party."

In *Forrest* v. *Jack*, 294 U. S. 158, 162, the court said:

"The liability of stockholders is based upon the statute, Sec. 64. As a general rule, the person in whose name the stock stands on the books of the bank is liable, but the actual owner may be held although the stock has not been registered in his name."

Also see *Ohio Valley National Bank* v. *Hulitt*, 204 U. S. 162; *Durance* v. *Collier*, 81 Fed. (2d) 4; *Early* v. *Richardson*, 280 U. S. 496; *McDonald* v. *Dewey*, 202 U. S. 510; 9 C. J. Sec., p. 1114; *National Bank* v. *Case*, 99 U. S. 628, 631.

There is no merit in the contention that the case should have been transferred to the law side. It presented complicated questions as to ownership of the stock of these banks and fraud is involved, which is a ground of equity jurisdiction. In any event, the defendant does not seem seriously to press his contention. Nor was its motion to transfer to the law side presented *in limine*.

Its bill of complaint was filed March 11, 1936. His motion to transfer was not made until November 15, 1937.

"The want of equity jurisdiction, if obvious, may and should be objected to by the court of its own motion. *Twist* v. *Prairie Oil Co.*, 274 U. S. 684, 690. In other cases, this jurisdictional requirement, unlike the others mentioned, may be treated as waived if the objection is not presented by the defendant *in limine*. *Duignan* v. *United States*, 274 U. S. 195, 199." *Matthews* v. *Rodgers*, 284 U. S. 524, 525.

"Equity jurisdiction may be invoked where there are complicated matters and interests and degrees of interests involved, and where fraud upon creditors is involved in the transfer which is assailed. *Adams* v. *Clarke* (C. C. A.), 22 F. (2d) 957; *Corker* v. *Soper* (C. C. A.), 53 F. (2d) 190; *McDonald* v. *Dewey*, 202 U. S. 510. . . . While the appellants denied in their answer the equity jurisdiction of the court, yet they made no resort to the usual procedure of a motion to dismiss the petition or to transfer the case to the law docket, and seemingly acquiesced in the equity proceedings. However this may be, it is clear that this case is one essentially for equitable cognizance." *Metropolitan Holding Co.* v. *Snyder*, 79 Fed. (2d) 263, 268.

The decree of the District Court, in so far as it holds Greaney liable on his note for $14,553.66 is reversed, and a decree may be entered dismissing the suit as to Greaney in so far as it involves his liability on this note. The decree of the District Court is affirmed as to Greaney's liability in the amount of $9,144, the amount of the assessment on the 457.2 shares of stock of the Boston Continental National Bank, with interest to the date of judgment.

On the same date, to wit, March 25, 1939, the following Final Decree was entered:

FINAL DECREE.

March 25, 1939.

This cause came on to be heard January 6, 1939, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, March 25, 1939,

here ordered, adjudged and decreed as follows: The decree of the District Court, in so far as it holds Greaney liable on his note for $14,553.66 is reversed, and a decree may be entered dismissing the suit as to Greaney in so far as it involves his liability on this note. The decree of the District Court is affirmed as to Greaney's liability in the amount of $9,144, the amount of the assessment on the 457.2 shares of stock of the Boston Continental National Bank, with interest to the date of judgment.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on April 21, 1939, mandate was stayed until further order of court.

CLERK'S CERTIFICATE.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages, numbered 1 to 91, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including April 26, 1939, in the cause in said court numbered and entitled,

No. 3415.

THOMAS E. GREANEY, DEFENDANT, APPELLANT,

v.

FREDERICK S. DEITRICK, RECEIVER, PLAINTIFF, APPELLEE.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twenty-sixth day of April, A. D. 1939.

[SEAL] ARTHUR I. CHARRON, *Clerk.*

[fol. 92] [Stamp:] Office of the Clerk, Supreme Court, U. S. Jun. 2, 1939

SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1938

FREDERICK S. DEITRICK, Receiver, Petitioner,

vs.

THOMAS E. GREANEY

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for the petitioner, and good cause having been shown, I hereby order that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended for a period of thirty-five days from June 25, 1939.

Felix Frankfurter, Associate Justice Supreme Court of the United States.

Washington, D. C., June 2, 1939.

[fol. 92] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

FILE COPY

FILED
JUL 29 1939
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 246

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank, *Petitioner*,

v.

THOMAS E. GREANEY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRENTON K. FISK,
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JAMES LOUIS ROBERTSON,
Attorneys for the Comptroller of the Currency,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. .....

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank, *Petitioner*,

v.

THOMAS E. GREANEY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Frederick S. Deitrick, receiver of the Boston-Continental National Bank by appointment of the Comptroller of the Currency, prays that a writ of certiorari issue to review the final decree of the United States Circuit Court of Appeals for the First Circuit rendered in the above case on March 25, 1939.

Opinions Below.

The opinion of the District Court of the United States for the District of Massachusetts appears on pages 13 to 17 of the record and is reported in 23 F. Supp. 758. The opinion of the Circuit Court of Appeals modifying the original decree of the District Court appears on pages 77 to 90 of the record and is reported in 103 F. (2d) 83.

Jurisdiction.

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. title 28, sec. 347).

The decree of the Circuit Court of Appeals for the First Circuit sought to be reviewed was entered on March 25, 1939 (R. 90-91). A petition was filed with the Honorable Felix Frankfurter, Associate Justice of the Supreme Court of the United States, for an extension of time within which to file petition for writ of certiorari in this case. Under date of June 2, 1939, an order was entered by Mr. Justice Frankfurter granting an extension of 35 days from June 25, 1939, within which to file a petition.

Question Presented.

Whether the receiver of an insolvent national bank may enforce a promissory note given to the bank by a director thereof for the purpose of concealing from the national bank examiners an illegal acquisition by the bank of shares of its own stock, where such note was given with a secret oral understanding that it was not to be enforced by the bank.

Summary Statement of Matters Involved.

In April, 1930, Boston National Bank purchased 190 shares of its own stock, in violation of the National Bank Act (sec. 5201 of Rev. Stat. of 1873 (U. S. C. title 12, sec. 83)) (R. 13). In order to conceal this illegal acquisition and owner-

ship from the national bank examiner (R. 30), and avoid the consequences thereof, a scheme was devised whereby the stock would be removed from the assets of the bank and replaced by a note of some person (R. 13).

Defendant Greaney was a shareholder of Boston National Bank (R. 56) and a director thereof from 1923 until the day it closed (R. 30). After conferring with Ulin, the president of the bank, Greaney was conversant with the plan for the disposition of the 190 shares. He thereupon prevailed upon one Karnow to execute a note in the amount of $23,500, payable to the bank. Karnow's note was discounted by the bank and he was given a check drawn on the bank in the amount of $23,203.14. In accordance with the agreement between the parties, Karnow deposited this check in another bank to the credit of Director Greaney. Greaney then issued his own check drawn against the deposit in the other bank payable to Boston National Bank for the full amount of the deposit. This check was delivered to Boston National Bank as the purchase price of said stock and the shares of stock were then transferred on the books of the bank to Greaney (R. 13-14). When Karnow's note became due he was persuaded to renew it and shortly thereafter he caused the stock to be transferred on the bank's records to his own name and he took actual possession of the new certificates (R. 14).

In the fall of 1930, a consolidation of Boston National Bank and Continental National Bank was effected, and the 190 shares of Boston National Bank stock were converted into 684 shares of stock of the consolidated bank. In connection with this consolidation, Ragan (who became president of the consolidated bank), together with one Balter, agreed to purchase these shares, and they gave the bank their three notes aggregating $24,000 in payment therefor, the stock to be delivered as the notes were paid. One of these (for $9,500) was paid; this amount was credited to Karnow's note; and a proportionate number of the shares were transferred from Karnow's name to the purchasers (R. 14-15).

Because of Karnow's insistence that he be relieved from liability, Greaney gave the consolidated bank his own note for $14,553.66, and this note was discounted by the bank and its check used to discharge the Karnow note (R. 15). At Greaney's request the shares were transferred into the name of one Mahoney, who had no knowledge of the transaction at any time prior to the commencement of this suit (R. 15.) The certificates in Mahoney's name were delivered to Greaney (R. 21).

In December, 1931, Boston-Continental National Bank closed its doors, and a receiver was appointed by the Comptroller of the Currency to administer its affairs (R. 14). At that time, as theretofore, Greaney's note was held by the bank among its regular assets, and was wholly unpaid (R. 26). On July 11, 1932, the Comptroller of the Currency levied a 100 per cent assessment upon all owners of stock of the bank. The assessment on the shares here involved has not been paid (R. 21-22).

In 1935, the petitioner sued Greaney, Karnow and Mahoney for the amount of the unpaid assessment, with interest, and sued Greaney and Karnow for the amount of the unpaid note, with interest (R. 4). The decree of the District Court held Greaney liable for the amount of the note and the amount of the assessment, both with interest, and dismissed the bill of complaint with respect to Karnow and Mahoney (R. 12). Greaney appealed, and the Circuit Court of Appeals affirmed the decree of the District Court with respect to Greaney's liability for the stock assessment, but reversed the decree as to liability on the note (R. 90).

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In failing to apply the law of Massachusetts to the question of Greaney's liability on his note.

2. In holding that where a note is given to a national bank by a director thereof in order to conceal from the national

bank examiners and the Comptroller of the Currency its true condition and its commission of illegal acts, the maker of such note may set up as a defense that the note was given for the accommodation of the bank and lacked consideration.

3. In holding that the receiver of an insolvent national bank is barred from enforcing a note because of the bank's participation in an unlawful act connected with the giving of the note.

4. In holding that the receiver of an insolvent national bank, who represents primarily the depositors and other creditors of the bank, is in no better position, with respect to recovery on such a note, than the bank itself would have been, suing as a solvent institution.

5. In failing to hold that the receiver of an insolvent national bank may enforce a note given to the bank by a director thereof in order to conceal from the national bank examiners an illegal acquisition by the bank of shares of its own stock.

6. In failing to affirm the decree of the District Court holding Greaney liable on his note.

Reasons for Granting the Writ.

1. The Circuit Court of Appeals has decided an important question of Massachusetts law in a way in conflict with the applicable decisions of the Supreme Judicial Court of Massachusetts. The question here presented is simply whether the receiver of a bank, as the representative of its depositors and other creditors, is entitled to enforce a promissory note knowingly given to the bank by one of its directors for the specific purpose of deceiving the public examining authorities with respect to the condition of the bank, and to conceal the fact that the bank, its directors, and its officers had violated the statute forbidding it to purchase shares of its own stock. Since the transactions in

question took place in Massachusetts, the interpretation, validity, and enforceability of the note are governed by the law of that State. *Erie R. Co.* v. *Tompkins*, (1938) 304 U. S. 64; *Gaston, Williams & Wigmore* v. *Warner*, (1922) 260 U. S. 201; *Marine Nat. Exch. Bk.* v. *Kalt-Zimmers Mfg. Co.*, (1934) 293 U. S. 357; *Reconstruction Finance Corporation* v. *O'Keefe*, (C. C. A. 3d, 1938) 98 F. (2d) 820; *Reno Nat. Bank of Reno, Nev.* v. *Seaborn*, (C. C. A. 9th, 1938) 99 F. (2d) 482; *Cherry* v. *Sprague*, (1904) 187 Mass. 113, 72 N. E. 456; *Walling* v. *Cushman*, (1921) 238 Mass. 62, 130 N. E. 175; *Sterrett* v. *Stoddard Lumber Co.*, (1935) 150 Ore. 491, 46 P. (2d) 1023; *Jefferis* v. *Kanawha Fuel Co.*, (1923) 182 Wis. 203, 196 N. W. 238. See *Conflict of Laws Restatement, secs.* 332, 336, 347, 358.

The controlling decision in Massachusetts is *Prudential Trust Co.* v. *Moore*, (1923) 245 Mass. 311, 139 N. E. 645. In that case directors of the bank executed and delivered promissory notes to it in order to replace certain excessive loans on the books of the bank and thereby "to prevent the closing of the bank", the makers having been assured by the president of the bank "that they were really assuming no liability at all". Thereafter, the bank was closed, insolvent, with these notes ostensibly among its assets. The Supreme Judicial Court of Massachusetts held the directors "estopped from denying the legal validity of these notes which the bank commissioner is now attempting to collect for the benefit of creditors of the bank". The opinion stated that it would be unjust and fraudulent to permit these directors "to now plead the invalidity of the very securities by which they induced others to make and leave deposits with the bank". Accordingly, the court held that the public officials representing the bank's depositors and other creditors were entitled to enforce the notes. Accord: *International Trust Co.* v. *Wattendorf*, (1926) 256 Mass. 323, 152 N. E. 306.

The pertinent facts of this case are almost identical with those of *Prudential Trust Co.* v. *Moore* and *International*

Trust Co. v. *Wattendorf*, both *supra*, even to the extent that Greaney, the maker of the note, was a director of the insolvent bank, as were the defendants in those cases. In fact, the circumstances of the present case even more strongly call for imposing liability on the maker of the note: In the *Prudential Trust Co.* case the directors were told by the bank president that "the situation involved simply a technical question" and could be cleared up in a few days, whereas in this case Greaney, the director, was entirely aware that the bank had acquired its own stock in violation of law and desired to conceal this fact from the bank examiners, the Comptroller of the Curreney, and through them the depositors and other creditors of the bank.

Whether negotiable instruments given to a banking institution in the circumstances of this and similar cases, which are valid on their face and have been included among the purported assets of the bank in reliance upon which deposits have been made and continued by innocent members of the public, shall be enforceable, upon the bank's insolvency, for the benefit of such depositors, is a question of great importance with respect to the safety and proper management of the banking facilities of any community.

That this question is a matter of unusual public concern has been recognized increasingly in recent years, as indicated by the tendency of courts to rely less upon the technical doctrine of estoppel, but rather to base the imposition of liability in these cases upon the broad principle of public policy that the stability of banks and popular confidence in our banking structure must not be jeopardized by spurious transactions of this character. This change in emphasis is clearly reflected in two important opinions handed down during the current year. In *O'Keefe* v. *Equitable Trust Co.*, (C. C. A. 3d, 1939) 103 F. (2d) 904, 908, the court said:

> "And again, a fortiori, will the policy apply to banks, institutions whose raison d'etre should guarantee the identity of reality and appearance. As a distin-

guished court and a learned professor of law put it: 'The state cannot sanction any device intended to give a false appearance to a transaction or increase the apparent stability of a bank. * * * Public policy requires that a person who, for the accommodation of the bank executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced.' Mount Vernon Trust Co. v. Bergoff, 272 N. Y. 192, 197, 5 N. E. (2d) 196, 197.

"* * * It is interesting to observe that the later cases place their decisions squarely on the ground of public policy and do not strain at an enlarged concept of consideration or an hypothetical estoppel."

And in *Rothschild v. Manufacturers Trust Co.*, (1939) 279 N. Y. 355, 18 N. E. (2d) 527, 529, the Court of Appeals of New York forcibly enunciated the same principle:

"An agreement, valid and enforcible if made by an ordinary corporation or business, may, by reason of public policy, be void and unenforcible against a banking institution. Thus, where a bank brings suit on a promissory note, the defendant may not plead lack of consideration and an agreement not to enforce the instrument, since the defendant knows or was chargeable with knowledge that the note might be used to conceal the actual transaction. * * * The public policy behind these rulings is that the stability of banks is a matter of such public concern that the State should not sanction any device intended to give a false appearance to a transaction or increase the apparent stability as contrasted with the true condition of a bank. It may be noted here that this rule of public policy in no wise depends upon the solvency or insolvency of the bank. * * *"

Accordingly, the action of the Circuit Court of Appeals for the First Circuit in failing to follow the controlling decisions of Massachusetts and to affirm the decree of the District Court holding Greaney liable on his note should be reviewed by this Court.

2. In addition to the conflict between the decision below and the decisions of the Supreme Judicial Court of Massachusetts, the decision below is in conflict with the principle applied by this Court in *Texas & Pacific Ry.* v. *Pottorff*, (1934) 291 U. S. 245, and with the decisions of the Circuit Courts of Appeals for the Fourth and Fifth Circuits in *Federal Reserve Bank* v. *Crothers*, (1923) 289 Fed. 777, and *Bohning* v. *Caldwell*, (1925) 10 F. (2d) 298 (cert. den. (1926) 271 U. S. 663), respectively. Accord: *Pauly* v. *O'Brien*, (C. C. Calif., 1895) 69 Fed. 460; *Utley* v. *Clarke*, (N. D. N. Y., 1936) 16 F. Supp. 435. See *McCandless, Receiver* v. *Furland*, (1935) 296 U. S. 140, 159, 160; *O'Keefe* v. *Equitable Trust Co., supra.*

The decision in the *Pottorff* case, *supra*, upheld the right of a receiver of an insolvent national bank to recover securities which the bank had pledged to secure deposits by the defendant railroad. This Court rejected the argument that the receiver was solely the representative of the bank and as such could "have no greater right" than the bank. The Court recognized that the receiver of an insolvent national bank may in some circumstances be entitled to enforce rights which the bank as a solvent institution could not have enforced, stating that "even if the bank would have been estopped from asserting lack of power, its receiver would be free to challenge the validity of the pledge".[1] (291 U. S. at 260.)

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[1] It should be mentioned that some of the leading decisions on this question by the highest courts of the several states reflect the tendency to hold such a note as that involved in this case enforceable not only by the receiver, but by the bank itself. *Rogers* v. *First State Bank*, (1926) 79 Colo. 84, 243 Pac. 637; *Cedar State Bank* v. *Olson*, (1924) 116 Kan. 320, 226 Pac. 995; *State Bank of Moore* v. *Forsyth*, (1910) 41 Mont. 249, 108 Pac. 914; *Bay Parkway Nat. Bank* v. *Shalom*, (1936) 270 N. Y. 172, 200 N. E. 685; *First National Bank* v. *Boxley*, (1927) 129 Okla. 159, 264 Pac. 184; *Bangor Trust Co.* v. *Christine*, (1929) 297 Pa. 64, 146 Atl. 545; *Farmers & Merchants' State Bank* v. *Perry*, (1925) 186 Wis. 93, 202 N. W. 179; see *Brannan, Negotiable Instruments Law* (6th ed. 1938) 454-457. However, that somewhat more difficult question does not arise in this case.

McCandless, Receiver v. *Furland, supra*, raised the question of the right of the receiver of an insolvent corporation to recover from its promoters unconscionable profits obtained by selling it land and marketing its securities. This Court held that the rights of creditors rose superior to a fraudulent attempt by the corporation and its insiders to impair its assets. "If the shareholders and the directors had combined with the promoters to despoil the corporation and defeat the remedies of creditors by a gift of half the assets, the gift could have been annulled either by the creditors directly or in their behalf by a receiver" (296 U. S. at 159). Again it was recognized that the creditors of a corporation, represented by its receiver, can assert rights which might not be enforceable by the corporation as a going concern:

> "There is no occasion to consider whether the corporation itself at the instance of new shareholders would be permitted to disaffirm the fraud and maintain a suit in equity for appropriate relief. We put that question by. *Enough that the receiver has the requisite capacity.*" (296 U. S. at 160. Italics ours)

In *Bohning* v. *Caldwell, supra*, the receiver of an insolvent national bank sued several of its directors on a note made by them and given to the bank to take the place of certain doubtful or worthless assets; "none of the makers of the note considered they would ever be called upon to pay it". The court held the note to be enforceable on the ground that since the makers of the note were *directors and stockholders* of the bank, there was sufficient consideration for the note, and also that the directors were estopped to deny consideration.

Federal Reserve Bank v. *Crothers, supra*, is particularly significant. The president of a national bank had persuaded Crothers to give the bank his note for $6,000 "to take the place of an equivalent of electric light plant bonds [constituting an excessive investment] for the satisfaction of

the bank examiner". The bank failed, and the court held its receiver entitled to enforce the note. Counsel for the defendant relied upon *Rankin* v. *City Nat. Bank*, (1908) 208 U. S. 541. Although the court (Taft, Circuit Justice, Woods, Circuit Judge, and Groner, District Judge) distinguished the *Rankin* case, their decision indicates a disposition to confine the holding in that case to the particular facts there presented.

The *Rankin* case, *supra*, which concerned a legal transaction between two banks, is not controlling in this case, where the defendant was a **director** of the insolvent bank, **fully acquainted with its affairs and the illegal transaction which he was assisting to conceal, despite the fiduciary duty which he owed to its depositors.** It is to be noted that the *Rankin* case has not been cited by this Court in over thirty years, except in *Deitrick* v. *Standard Surety Co.*, (1938) 303 U. S. 471, where the decision was based primarily on the condition of the pleadings.

The overwhelming weight of authority of the state courts concurs in holding that negotiable instruments given to banks in the circumstances here presented are enforceable by the receivers thereof.[2]

Murphy, Receiver v. *Gumaer*, (1902) 18 Colo. App. 183, 70 Pac. 800.
Ashley v. *Rowe*, (1931) 101 Fla. 110, 133 So. 551.
Niblack v. *Farley*, (1919) 286 Ill. 536, 122 N. E. 160.
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Prudential Trust Co. v. *Moore*, (1923) 245 Mass. 311, 139 N. E. 645.

[2]Although only one case is cited from each state the highest court of which has passed on this question, it should be noted that in a number of jurisdictions the principle has been reiterated and applied by the highest and intermediate appellate courts in a number of other cases.

Parker v. *Parker*, (1938) 287 Mich. 49, 282 N. W. 897.
German-American Finance Corp. v. *Merchants & Mfrs. Bank*, (1929) 177 Minn. 529, 225 N. W. 891.
Bank of Slater v. *Union Station Bank*, (1920) 283 Mo. 308, 222 S. W. 993.
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Harrington v. *Connor*, (1912) 51 Neb. 214, 70 N. W. 911.
Park Place Discount Co. v. *Taylor*, (1937) 119 N. J. L. 253, 195 Atl. 520.
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Arthur v. *Brown*, (1912) 91 S. C. 316, 74 S. E. 652.
Shaw v. *Borchers*, (Texas, 1930) 46 S. W. (2d) 967.
West Rutland Tr. Co. v. *Houston*, (1932) 104 Vt. 204, 158 Atl. 69.
Moore v. *Kildall*, (1920) 111 Wash. 504, 191 Pac. 394.
Schwenker v. *Teasdale*, (1931) 206 Wis. 275, 239 N. W. 434.

See also:

Day v. *Farmers' & Merchants' Bank*, (1934) 229 Ala. 372, 376, 377, 157 So. 439, 443, 444.
Riches v. *Hadlock*, (1932) 80 Utah 265, 288, 15 P. (2d) 283, 292.
Webb v. *Pleasants*, (1926) 144 Va. 516, 519, 132 S. E. 175, 176.
Brannan, Negotiable Instruments Law (6th ed. 1938) 458-460.

As indicated hereinabove, the question presented by this case is one of great importance with respect to the stability and proper management of the institutions which make up

our public banking system. In order to protect the public from a practice which, if permitted, would dangerously impair the capital of national banks, the National Bank Act prohibits national banks from purchasing shares of their own capital stock, as was done in this case. In fact, the danger is considered so great that Congress has specifically authorized the Comptroller of the Currency to appoint a receiver to close up the business of any bank which holds shares of its stock in violation of this section of the law. Section 5201 of Rev. Stat. of 1873 (U. S. C. title 12, sec. 83).

Without doubt, the most effective method employed by the Government to protect the public against just such hazardous departures from safe and sound banking practice is the conduct of thorough periodic examinations of national banks by bank examiners appointed by the Comptroller. Section 5240 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 481). A rule of law permitting a **director** of a national bank to escape liability to the depositors and creditors of such bank (or a receiver acting for their benefit), where such director has conspired with other bank officials to deceive the Comptroller and his examiners, and through them the public, as to the true condition of the bank, and to conceal from them the commission of a highly dangerous violation of the banking laws, by placing among the assets of the bank an obligation *prima facie* valid and enforceable but subject to a secret agreement that it was not to be enforced, would defeat the entire purpose of the regulatory statutes and would be in conflict with sound public policy.

Accordingly, the action of the Circuit Court of Appeals for the First Circuit in departing from the controlling principles recognized in the decisions of this Court, in other Circuit Courts of Appeals, and in the overwhelming majority of the state courts which have passed upon this question, should be reviewed by this Court.

Conclusion.

For the reasons stated, it is respectfully submited that this application for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 246.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank, *Petitioner*,

v.

THOMAS E. GREANEY, *Respondent*.

BRIEF FOR FREDERICK S. DEITRICK, RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK, PETITIONER.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 246.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank, *Petitioner*,

v.

THOMAS E. GREANEY, *Respondent*.

BRIEF FOR FREDERICK S. DEITRICK, RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK, PETITIONER.

OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Massachusetts appears on pages 13 to 17 of the record and is reported in 23 F. Supp. 758. The opinion of the Circuit Court of Appeals modifying the decree of the District Court appears on pages 77 to 90 of the record and is reported in 103 F. (2d) 83.

JURISDICTION.

The jurisdiction of this Court is invoked under sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. title 28, sec. 347(a)).

The decree of the Circuit Court of Appeals for the First Circuit was entered on March 25, 1939 (R. 90-91). The petition for *certiorari* was filed July 29, 1939, a thirty-five day extension of the time therefor having been first duly granted by Mr. Justice Frankfurter.

The order of this Court granting a writ of *certiorari* was issued October 9, 1939.

STATEMENT OF FACTS.

In April, 1930, Boston National Bank purchased 190 shares of its own stock, in violation of the National Bank Act[1] (R. 13, 17). Several months later, in order to conceal this illegal acquisition and ownership from the national bank examiners, who were then examining the bank (R. 30-31), and to avoid the consequences thereof, a scheme was devised whereby the stock would not appear among the assets of the bank, but would be replaced by a note of some person (R. 13).

Defendant Greaney was a shareholder of Boston National Bank (R. 34, 56), and a director thereof from 1923 until the day it closed (R. 30). Ulin, the president of the bank, and Greaney discussed plans for disposing of the 190 shares (R. 30-31). Greaney thereafter prevailed upon one Karnow to execute a note in the amount of $23,500, payable to the bank. Karnow's note was discounted by the bank, and he was given a check drawn on the bank in the amount of $23,203.14. In accordance with the agreement between the parties, Karnow deposited this check in another bank to the

[1] "No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section fifty-two hundred and thirty-four." Section 5201 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 83).

credit of Director Greaney. Greaney then issued his own check drawn against the deposit in the other bank payable to Boston National Bank for the full amount of the deposit. This check was delivered to Boston National Bank as the purchase price of said stock, and the shares were then transferred on the books of the bank to Greaney (R. 13-14). When Karnow's note became due he was persuaded to renew it and shortly thereafter he caused the stock to be transferred on the bank's record to his own name and he took actual possession of the new certificates (R. 14).

In the fall of 1930, a consolidation of Boston National Bank and Continental National Bank was effected, and the 190 shares of Boston National Bank stock were converted into 684 shares of stock of the consolidated bank. In connection with this consolidation, one Ragan (who became president of the consolidated bank), together with one Balter, agreed to purchase these, and other, shares. They gave the bank several notes, three of which, aggregating $24,000, were given by the bank to Greaney with the understanding that the stock was to be delivered as the notes were paid. One of these notes (for $9,500) was paid; this amount was credited to Karnow's note; and at Greaney's request a proportionate number of the shares were released by Karnow and transferred from Karnow's name to the purchasers' (R. 14-15).

Later, because of Karnow's insistence that he be relieved from liability, Greaney gave the consolidated bank his own note for $14,553.66, and this note was discounted by the bank and its check used to discharge the Karnow note (R. 15). At Greaney's request the shares were transferred into the name of one Mahoney, who had no knowledge of the transaction at any time prior to the commencement of this suit (R. 15, 21).

In December, 1931, Boston-Continental National Bank closed its doors, and a receiver was appointed by the Comptroller of the Currency to administer its affairs (R. 14). At that time, as theretofore, Greaney's note was held by

the bank among its regular assets, and was wholly unpaid (R. 26). On July 11, 1932, the Comptroller of the Currency levied a 100 per cent assessment upon all owners of stock of the bank (R. 15).

In 1935, the petitioner sued Greaney, Karnow, and Mahoney for the amount of the unpaid assessment on the shares in Mahoney's name, with interest, and sued Greaney and Karnow for the amount of the unpaid note, with interest (R. 4, 13). The decree of the District Court held Greaney liable for the amount of the note and the amount of the assessment, both with interest, and dismissed the bill of complaint with respect to Karnow and Mahoney (R. 12). Greaney appealed, and the Circuit Court of Appeals affirmed the decree of the District Court with respect to Greaney's liability for the stock assessment but reversed the decree as to liability on the note (R. 90). This Court granted a writ of *certiorari* with respect to Greaney's liability on the note, but refused to grant a writ of *certiorari* on a cross petition filed by Greaney with respect to his liability for the stock assessment.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that where a note is given to a national bank by a director thereof in order to conceal from the national bank examiners and the Comptroller of the Currency its true condition and its commission of illegal acts, the maker of such note may set up as a defense that the note was given for the accommodation of the bank and lacked consideration.

2. In holding that the receiver of an insolvent national bank is barred from enforcing a note because of the bank's participation in an unlawful act connected with the giving of the note.

3. In holding that the receiver of an insolvent national bank, who represents primarily the depositors and other

creditors of the bank, is in no better position, with respect to recovery on such a note, than the bank itself would have been, suing as a solvent institution.

4. In failing to hold that the receiver of an insolvent national bank may enforce a note given to the bank by a director thereof in order to conceal from the national bank examiners an illegal acquisition by the bank of shares of its own stock.

5. In failing to affirm the decree of the District Court holding Greaney liable on his note.

6. In the event that the question of Greaney's liability on his note is governed by the law of Massachusetts, in failing to apply the rule established by the decisions of the highest Court of that State.

SUMMARY OF ARGUMENT.

This is a suit upon a promissory note by the receiver of an insolvent national bank. The respondent defends on the ground that the note was given without consideration and in order to deceive the national bank examiners and to conceal from them the bank's violation of the banking laws, and that it was subject to a secret understanding that it would not be enforced.

This controversy must be governed *either* by Acts of Congress or by the law of Massachusetts (in which State the contract was made and was to be performed).

If the case is governed by Acts of Congress, it must be by virtue of a policy inherent in the National Bank Act, for there is no specific statutory provision with respect to this question. It would be preposterous to contend that the policy of the National Bank Act is to protect persons engaging in transactions inimical to the soundness of the national banking system. On the contrary, it affirmatively appears from the powers of examination and supervision vested in the Comptroller of the Currency that the statu-

tory policy is absolutely opposed to any device or scheme calculated to give a fictitious and deceptive appearance to the assets of a national bank. By virtue of this policy, which forms an integral part of the National Bank Act, the petitioner is entitled to enforce this promissory note for the benefit of the very class of persons whom the National Bank Act is primarily designed to protect: the depositors and other creditors.

The overwhelming weight of the authorities concurs in permitting recovery in these circumstances by receivers of both state and national banks.

If the case is governed by the law of Massachusetts, the petitioner clearly is entitled to enforce the note, under the applicable decisions of the highest Court of that State.

ARGUMENT.

I.

Analysis of Question Presented.

(A) The question here presented is simply whether the receiver of a national bank as the representative of its depositors and other creditors is entitled to enforce a promissory note knowingly given to the bank by one of its directors for the specific purpose of deceiving the national bank examiners, and through them the Comptroller of the Currency and the public represented by him, with respect to the condition of the bank, and to conceal the fact that the bank and its directors had violated the provision of the National Bank Act forbidding national banks to purchase shares of their own stock.[2]

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[2] Section 5201 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 83), *supra*, page 2, note 1.

In the Appendix are set forth other statutory provisions which indicate the importance attached by Congress to the establishment and preservation of adequate capitalization for national banks. See particularly Secs. 5138, 5139, 5140, 5141, 5204, and 5234 of Rev. Stat. of 1873, as amended (U. S. C. title 12, secs. 51-56, incl.)

The present suit was instituted by the receiver for the purpose of enforcing one of a number of promissory notes which were among the assets of the bank when it closed. This note is in the ordinary form without anything to indicate that it is other than a valid and subsisting obligation. Greaney, the maker, who was a director of the bank, seeks to escape liability by setting up a secret oral understanding with other directors and officers of the bank to the effect that he would not be held liable on the note, and by asserting that the note was made and given in order to conceal an illegal transaction and to deceive the national bank examiner and the Comptroller of the Currency and thus to frustrate them in the performance of their duty to protect the integrity and safety of the national banking system as well as the public, including those members thereof who were depositors or creditors of the bank.

The Circuit Court of Appeals for the First Circuit ruled that Greaney may set up as a defense that his note was given for the accommodation of the bank; and that instead of Greaney being precluded from asserting this defense by reason of his participation in the illegal enterprise, the receiver of the closed bank is not permitted to enforce payment because of the bank's participation in the unlawful acts. That Court stated that certain federal court cases cited by it, discussed hereinafter, establish a rule to the effect that "where a note is given to a national bank without consideration and for its accommodation to conceal its true financial condition from a national bank examiner or the Comptroller's office, the maker may set up the defense of lack of consideration as against the receiver of a closed national bank" (R. 84).

We respectfully submit that these rulings of the Circuit Court of Appeals were erroneous.

In purchasing 190 shares of its own outstanding capital stock, Boston National Bank and the participating directors and officers were guilty of a violation of the National

Bank Act which would have justified the Comptroller of the Currency in taking steps to terminate the bank's existence (Sections 5201 and 5239 of Rev. Stat. of 1873, as amended (U. S. C. title 12, secs. 83 and 93); see Appendix), or, at least, in requiring the prompt correction of the situation resulting from the illegal act. (As a matter of practice, it is probable that if the illegality had come to light, the examiner would have required that the illegally acquired stock be replaced promptly by cash equal to the amount illegally expended therefor.)

In order to avoid either of the possible results mentioned above, the president of the bank devised a scheme for concealing the illegal purchase and retention from the bank examiners and the Comptroller of the Currency. Greaney, who had long been a director of the bank, was a party to this scheme from its inception, and it was he who persuaded Karnow to give the bank his note to take the place of the stock. Later, in further pursuance of the general plan of concealment, Greaney gave to the bank his own promissory note for $14,533.66 to replace Karnow's note, which had been reduced to that amount, and the remaining shares of illegally held stock were thereupon registered in the name of Greaney's nominee, and the new certificates were delivered to, and retained by, Greaney.

The defense interposed by Greaney in this suit amounts simply to this: It was the intent of the parties to this deception that the illegally acquired stock should remain the property of the bank, and that Greaney's note should merely hide such ownership and should never be enforced against him. The question before the Court is whether, in this situation, such a defense should be upheld.

As the result of the scheme and deception outlined above, the national bank examiners were deceived and kept in ig-

norance of the bank's illegal acquisition of its own stock,[3] which had reduced and impaired to that extent the capital which was supposed to serve as protection for depositors and other creditors of the bank. For approximately one and one-half years, the Boston National Bank and its successor, the Boston-Continental National Bank, continued to conduct a banking business. In December of 1931, the Comptroller found the Boston-Continental National Bank to be insolvent and appointed a receiver to wind up its affairs.

In this suit the receiver is acting for the benefit of the depositors and creditors,[4] and for the purposes of the matter here involved it would be highly technical and unreal to say that the receiver only represents and stands in the place of the defunct association, and is subject to every defense which would be good against it. The persons whom

[3] *Cf.* Sec. 5209 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 592):

> "Any officer, director, agent, or employee * * * of any national banking association * * * who makes any false entry in any book, report, or statement of * * * such national banking association * * *, with intent in any case * * * to deceive * * * the Comptroller of the Currency, * * * or any agent or examiner appointed to examine the affairs of * * * such national banking association * * *, and every person who, with like intent, aids or abets any officer, director, agent, employee, or receiver in any violation of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States shall be fined not more than $5,000 or shall be imprisoned for not more than 5 years, or both, in the discretion of the court."

[4] For authority that a receiver represents creditors as well as the bank and may sue in their behalf, see: *Kennedy* v. *Gibson*, (1869) 8 Wall. 498, 506; *Case* v. *Terrell*, (1870) 11 Wall. 199, 202; *Casey* v. *Cavaroc*, (1877) 96 U. S. 467, 489; *In re Pleasant Hill Lumber Co.*, (1910) 126 La. 743, 757, 52 So. 1010; *Duke* v. *Stayton Co.*, (1924) 132 Wash. 69, 77, 231 Pac. 171; *Atlantic Trust Co.* v. *Dana*, (C. C. A. 8th, 1903) 128 Fed. 209, 221; *De Stefano* v. *American Chocolate Almond Co.*, (1930) 107 N. J. Eq. 156, 159, 152 Atl. 2; *Industrial Mutual Depositors Co.'s Receiver* v. *Taylor*, (1904) 118 Ky. 851, 854, 82 S. W. 574; *Iglehart* v. *Todd*, (1931) 203 Ind. 427, 440, 178 N. E. 685; High, Receivers (4th ed.) secs. 314, 320.

he represents had no hand in, and were unaware of, the deception and scheme; they were, in fact, the victims of the deception and would be the sufferers if Greaney were permitted now to disavow his prior representations. In other words, Greaney now claims the right to deny liability upon his note, which the national bank examiners considered to be a valid and subsisting asset of the bank. This asserted privilege he bases on the secret oral understanding between him and other officers and directors of the bank.

(B) Unless the situation here presented is "governed by the Federal Constitution or by Acts of Congress", the substantive law to be applied is that of the state (Massachusetts) in which the parties resided and in which the contract was made and was to be performed. *Erie R. Co.* v. *Tompkins* (1938), 304 U. S. 64; *Ruhlin* v. *New York Life Insurance Co.* (1938), 304 U. S. 202. On the other hand, if the matter is within the purview of a federal statute or general statutory scheme or policy, the decision should be based upon the language and intent of such governing statutes.

The determination of the applicable law depends solely upon whether the matter is one governed by the Federal Constitution or Acts of Congress. There is no federal statutory provision expressly and specifically relating to this question and, accordingly, if it were held to be governed by Acts of Congress it would have to be on the basis that the Acts of Congress relating to national banks evidence a purpose or underlying policy to assure effective examination, regulation and supervision of such banks by the Comptroller of the Currency and his examiners, which must be recognized as an intrinsic, although implied, part of the National Bank Act.

This Court and inferior federal courts have indicated that some classes of controversies arising in connection with receiverships and liquidations of national banks are subject to the law of a particular state in accordance with

the ordinary principles governing the conflict of laws. *Cf. Willing, Receiver* v. *Binenstock* (1937), 302 U. S. 272 (offsets); *Downey* v. *City of Yonkers* (C. C. A. 2d, 1939), 106 F. (2d) 69; *Reconstruction Finance Corporation* v. *O'Keefe* (C. C. A. 3rd, 1938), 98 F. (2d) 820 (secured claims); *Reno National Bank of Reno, Nev.* v. *Seaborn* (C. C. A. 9th, 1938), 99 F. (2d) 482 (preferences). However, the precise scope of *Erie R. Co.* v. *Tompkins* (1938), 304 U. S. 64, in the national banking field has not been fully delineated. *Cf. Wichita Royalty Company* v. *City National Bank* (1939), 306 U. S. 103; *Schram* v. *Poole* (C. C. A. 9th, 1938), 97 F. (2d) 566; *Schram* v. *Smith* (C. C. A. 9th, 1938), 97 F. (2d) 662; *Starr* v. *Schram*, (E. D. Mich., 1938), 24 F. Supp. 888.

The administration and supervision of the National Banking System by the Comptroller of the Currency would be facilitated and aided by a decision of this Court holding that matters of this type, where officers and directors of national banks through deceptive practices deliberately interfere with and seek to frustrate the effective functioning of the national bank examiners, are "governed by" the National Bank Act. Nevertheless, pursuant to his duty to the depositors and other creditors of the Boston-Continental National Bank receivership, and pursuant to instructions of the Comptroller of the Currency, the petitioner has briefed the question before the Court on each of the alternatives mentioned in the first paragraph of this subsection (B).

As far as the outcome of this particular case is concerned, it is believed to be immaterial whether the matter is subject to the law of Massachusuetts or is governed by the National Bank Act, since the law of Massachusetts (like the law of practically all other states whose courts have considered this question) is in accord with the obvious purpose of the National Bank Act to protect depositors and creditors of national banks from just such fraudulent transactions on the part of officers and directors thereof as are involved in this case. In view of this absence of conflict, the Court may deem it unnecessary to determine the question of the applicable law.

II.

The Decision of the Circuit Court of Appeals Should be Reversed as Unsound in Principle and Contrary to the Underlying Policy of the National Bank Act, as Well as Sound Public Policy With Respect to Banking Institutions in General. The Overwhelming Weight of the Authorities Concurs in Imposing Liability in This Situation.

(A) The Circuit Court of Appeals erred in concluding that the petitioner's suit on Greaney's note, unlike the stock assessment suit, is fatally tainted with illegality.

While the Circuit Court of Appeals ruled that Greaney could deny liability on the note, it also ruled that "a different situation" existed with respect to the stock assessment, so that Greaney could not deny ownership of the stock and thus escape the assessment liability. The reasons advanced for such a distinction are contained in the following extracts from the opinion below:

> "* * * Such an assessment is lawful. It is independent of any method by which the stockholder acquired the stock. It is authorized by the National Banking Act, 12 U. S. C. A. 191, 192, and falls on every person who in law may be treated as the owner of the stock.
>
> "The assessment in this case was not made pursuant to any unlawful acts by the officers of the bank, in which they participated, *Trustees of Somerset Academy* v. *Picher*, 90 Fed. (2d) 741, 744. Any judgment recovered on an assessment is not for the benefit of the bank, but is for the benefit of creditors of the bank. *Dunn et al.* v. *O'Connor et al.*, 89 Fed. (2d) 820, 826; *Page* v. *Jones*, 7 Fed. (2d) 541, 544, cert. denied, 269 U. S. 587" (R. 84-5).
>
> "Greaney's status in the suit by the receiver to collect the assessment is not affected by his participation in the unlawful transaction between him, Ulin and the Boston National Bank. The Comptroller was not a party to any unlawful transaction. On this branch of

> the case Greaney is not sued on his note by a party equally guilty as himself of unlawful acts. The imposition of the liability for the assessment of the Comptroller is statutory and is independent of any liability of Greaney on his note or lack of it. Greaney as against the lawful acts of the Comptroller could not set up as a defense an unlawful transaction in which he participated, but in which the Comptroller did not participate" (R. 87-8).

As these extracts indicate, the court below enforced the stock assessment against Greaney on the ground that the "assessment is lawful" and "was not made pursuant to any unlawful acts by the officers of the bank". With respect to the note, however, it said:

> "Appointment of a receiver does not absolve such a note of the taint of illegality. His rights are in no way superior to the rights of the bank, and the time-honored principle denying enforcement of illegal obligations holds."

Certainly there is nothing unlawful in the petitioner's suit on either aspect of the case. As a matter of fact, the applicability of the assessment to Greaney flowed from the "unlawful act" of Greaney and the bank's officers in fraudulently transferring the stock to Greaney's nominee while retaining secret beneficial ownership in the bank—the very transaction which gave rise to the note here in suit. The "Comptroller did not participate" in this transaction in *any* respect.

It is earnestly contended, therefore, that the distinction drawn by the Circuit Court of Appeals rests upon an erroneous theory, and lacks any real and factual justification. Apparently the court had in mind the fact that the immediate basis for recovery on one aspect was the note given to the bank as a going concern, whereas on the other aspect it was an assessment order made subsequent to suspension. But, of course, the assessment was based upon the ownership of the stock transferred to Greaney at

the time he gave this note to the bank, and therefore is as much—or as little—connected with the illegality and deceit as is the suit on the note itself.

The opinion states in effect that the suit against Greaney on the note is being maintained "by a party equally guilty as himself of unlawful acts", and for this reason Greaney is entitled to escape. This highly technical position, based solely on the circumstance that the note was among the assets found in the bank when the receiver took charge, disregards the realities of the situation. Elsewhere the Circuit Court of Appeals emphasized that

> "Any judgment recovered on an assessment is not for the benefit of the bank, but is for the benefit of creditors of the bank."

However, it apparently failed to realize that this is precisely and fully as true with respect to recovery on the note. Both aspects of this suit were brought for the benefit of this class by their representative, the agent of the Comptroller of the Currency,[*] who, as the court stated, was "not a party to any unlawful transaction". The judgments on both the note and the assessment will equally accrue to the benefit of the depositors and other innocent creditors. With a deliberate design to deceive the bank examiners, and present and prospective depositors, Greaney placed this note among the assets of the bank and took title to the stock. Judgment against him in this case, on both aspects, will be for the benefit of the persons whom he deceived and injured. The court below enunciated the correct principle in speaking of the stock assessment liability:

> "Greaney as against lawful acts of the Comptroller could not set up as a defense an unlawful transaction

[*] For authority that receiver is an officer or agent of the Comptroller of the Currency, see *Kennedy* v. *Gibson*, (1869) 8 Wall. 498, 505; *National Bank of Metropolis* v. *Kennedy*, (1872) 17 Wall. 19, 22; *Huls* v. *Argetsinger*, (W. D. N. Y. 1926) 12 F. (2d) 933, 935; *Spurway* v. *Lehman*, (C. C. A. 5th, 1932) 58 F. (2d) 227, 228; *cert.* denied 287 U. S. 621.

in which he participated, but in which the Comptroller did not participate."

Our position is simply that this rule is fully as applicable to the suit upon the note as to the suit upon the stock assessment.

(B) The decisions relied upon by the Circuit Court of Appeals are not specifically applicable to, or decisive of, the question presented.

On the question of liability on the note, the Circuit Court of Appeals cited and relied upon *Rankin* v. *City National Bank* (1908), 208 U. S. 541, its own decision in *Deitrick* v. *Standard Surety Co.* (1937), 90 F. (2d) 862, several cases decided by the Circuit Court of Appeals for the Eighth Circuit and the District Court for the District of Kansas, and one decision of the Circuit Court of Appeals for the Sixth Circuit.* Since the decisions after the *Rankin* case were based upon a general principle supposedly enunciated therein, the relevant facts and the scope of the decision in that case warrant the following full discussion.

For the purpose of deceiving the national bank examiner by removing three criticized loans in the aggregate amount of $30,000 from the assets of the Guthrie National Bank, the president of that bank (named Billingsley) executed his personal note in favor of the City Bank and received a credit of $30,000 in his personal account in the City Bank,

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* *Peterson* v. *Tillinghast*, (C. C. A. 6th, 1911) 192 Fed. 287; *Hookway* v. *First National Bank*, (C. C. A. 8th, 1929) 36 F. (2d) 166; *Andresen* v. *Kaercher*, (C. C. A. 8th, 1930) 38 F. (2d) 462; *Cutler* v. *Fry, Yates Center National Bank* v. *Lauber, Same* v. *Schaede*, (D. Kan. 1915) 240 Fed. 238, 237, 240, (the last was affirmed without opinion (C. C. A. 8th, 1916) 240 Fed. 241).

Cases not cited by the court below but standing for the same principal are: *Skud* v. *Tillinghast*, (C. C. A. 6th, 1912) 195 Fed. 1; *Bosworth* v. *Cady*, (C. C. A. 8th, 1934) 72 F. (2d) 63; *Kaercher* v. *Citizens National Bank*, (C. C. A. 8th, 1934) 57 F. (2d) 58; *Keyes* v. *First National Bank of Aberdeen*, (D. S. D. 1927) 20 F. (2d) 678.

under an agreement that the credit could be applied on his note at any time. By a circuitous route, the $30,000 credit in Billingsley's personal account was transferred to the credit of a special account of the Guthrie Bank in the City Bank, and the records of the Guthrie Bank thereupon showed an additional asset of $30,000 without showing Billingsley's note as a counterbalancing liability. By this device, the credit of the Guthrie Bank on the books of the City Bank was substituted for the three criticised loans aforementioned. Prior to the time the Guthrie Bank was closed because of insolvency, and without knowledge of its failing condition, the City Bank charged Billingsley's note against the special account of the Guthrie Bank. Later the Guthrie Bank was declared insolvent, and its receiver instituted suit against the City Bank to recover the amount which had been used to pay off the note of Billingsley, on the ground that the note represented the president's own personal obligation and not that of his bank. This Court held that the note was in reality the obligation of the Guthrie Bank and denied relief to the receiver. It expressly stated (208 U. S. at 545) that "* * * in the Circuit Court both counsel agreed that it was not contended that the contract was illegal because it enabled a false showing to be made of the condition of the Guthrie Bank". Under these circumstances, this Court held that the receiver could not recover from the City Bank, and added:

> "If the Guthrie Bank had sued while it was a going concern it would not have recovered, and the receiver stands no better than the bank."

In this connection it is to be specially noted, as pointed out by this Court, that at the time the City Bank charged Billingsley's note against the Guthrie Bank's account, it had no knowledge that the Guthrie Bank was in a failing condition; thus, prior to the suspension of the Guthrie Bank, the City Bank had seasonably and in good faith

extricated itself from the whole transaction. In that case, therefore, there was some basis for the quoted statement, but it should be noted that the question as to whether the rights of a receiver can rise higher than those of the bank, as a general principle, was raised neither in the briefs nor in the record before the Court in that case.

The theory of the *Rankin* case was followed by the District Court in the instant case when it held that Karnow, who executed the original note used to take out of the bank the illegally acquired bank stock, having extricated himself from the entire situation seasonably, in good faith and without apprehension of the failing condition of the bank, could not be held liable by the receiver (R. 16). The situation of Greaney is very different, for when the receiver was appointed and took over the assets of the insolvent national bank there was among the assets a note executed by Greaney which purported to be a valid and subsisting obligation. In these circumstances, it is contended by petitioner, the above-quoted language of the *Rankin* case is not applicable, and the receiver stands better than the bank itself.[7]

An additional important factor which should be kept in mind is that whereas in the *Rankin* case the irregular transaction was one between two banks, in the instant case the defendant was a director of the bank, fully acquainted with its affairs and the illegal transaction which he was assisting to conceal, despite the fiduciary duty which he owed its depositors.

It is respectfully submitted that whereas in the *Rankin* case the receiver may not have stood better than the bank because the defendant City Bank had extricated itself from the irregular transaction prior to the Guthrie Bank's suspension, in good faith, and without knowledge of the impending insolvency, the adoption by the Circuit Court

[7] It is assumed at this point, *arguendo gratia*, that the bank itself would not have been entitled to enforce the note. But see pp. 24 and 30, notes 9 and 14, *infra*.

of Appeals of a construction of the language of the *Rankin* case as establishing an invariable rule decisive of the present cause, was unwarranted and erroneous. Every decision relied upon by the Circuit Court of Appeals on this point and practically every decision of the federal courts which is in accord with those cases is based upon the same erroneous application of the language contained in the *Rankin* case.

The *rationale* of some of the cases cited in the decision below (*e. g., Cutler* v. *Fry, Yates Center National Bank* v. *Schaede, Sante* v. *Lauber*, all *supra*) appears to be that a receiver, on behalf of depositors, can in no circumstances have the benefit of a promise contained in a note without assuming the burden of the bank's counter-promise that the note will not be enforced. However, this Court has decided that in certain cases a national bank itself or—after its insolvency—its receiver may enjoy the benefits of an *ultra vires* contract without assuming the burden thereof. See *Augotin* v. *Atlas Exchange National Bank* (1935), 295 U. S. 209; *Texas & Pacific Ry.* v. *Pottorff* (1934), 291 U. S. 245; *City of Marion* v. *Sneeden, Receiver* (1934), 291 U. S. 262.

The Circuit Court of Appeals also relied upon its own decision in the case entitled *Deitrick* v. *Standard Surety Company* (C. C. A. 1st, 1937), 90 F. (2d) 862, which was affirmed by this Court in (1938) 303 U. S. 471. The affirmance of that case by this Court was based primarily upon the condition of the pleadings, and in this connection, this Court stated in the next to the last paragraph of the majority opinion:

> "An examination of the pleadings makes it quite clear that the Receiver undertook to set up rights acquired by the insolvent bank through duly executed contracts between it and the Surety Company. He makes no suggestion of a purpose attributable to the company to mislead creditors or others; makes no allegations of damage except that sustained by the bank. He sets up no facts which would render unconscionable

a denial of liability upon the bond because of the agent's fraud obviously induced by the president of the bank. In this state of the pleadings the Receiver may not have judgment; he cannot rely on something not complained of, nor can he have damages because of supposed deceptions which the pleadings fail to suggest'' (303 U. S. at 480).

The situation with reference to the pleadings in the instant case, however, is substantially different: The allegations in the amended bill of complaint (R. 2, 3) set forth, in substance, the various steps by which the respondent Greaney, who was a director of the bank, took part in the removal from the bank of the 190 shares of its own stock which it had illegally acquired and continued to hold, and the substitution of the note of Karnow and thereafter of the note of Greaney in lieu thereof, and the payment for said shares of stock out of the funds of the bank itself, resulting from the discounting of said notes. It is therefore clear from the face of the bill of complaint that respondent Greaney, with the cooperation of the officers of the bank, executed the note upon which he is sought to be held liable, as part of a plan to remove the illegally held stock and conceal the real condition of the bank in that respect by the substitution of the notes in question. The only purpose which can be reasonably inferred from the activities so described was to have the bank's assets appear, for purposes of examination, in other than their true condition.

In addition, it is important to note that respondent Greaney, in his answer (R. 7-10), denies liability on the ground that the notes were executed on behalf and for the accommodation of the bank, and in substance states that the purpose was to prevent the stock from appearing among the bank's assets, the arrangement being worked out at the request of and in conjunction with the president of the bank (Respondent's answer, Par. 9; R. 9).

Referring now to the above quoted extract from the opinion of this Court in the *Standard Surety Company* case,

considered in the light of the pleadings and issues in the instant case, it affirmatively appears that the pleadings in the instant case do make "suggestion of a purpose attributable to" respondent "to mislead creditors or others * * *"; and further, said pleadings do set up "facts which would render unconscionable a denial of liability * * * upon the note".

The last paragraph of the majority opinion of this Court in the *Standard Surety Company* case cited *Rankin* v. *City National Bank, supra,* stating that

> "We adhere to the doctrine there approved and regard it as decisive of the present cause."

For the reasons set forth above, the facts of the *Rankin* case may have justified the statement therein that "If the Guthrie Bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank." However, it is with deference urged that this broad doctrine was not decisive of the question presented in *Deitrick* v. *Standard Surety Co., supra,* and should not have been relied upon, as it apparently was, as an alternative ground for the Court's disposition of that case.

Although the Circuit Court of Appeals relied on the cases cited on page 15, *supra,* as establishing a binding rule of decision, it is submitted that none of those cases is analogous to the question before the Court. Not one involved a note given by a **director** who had full knowledge of the illegality involved and whose action was a part of a scheme to deceive the bank examiners and thus avoid the application of correctives by the governmental supervising authority which might diminish the ostensible value of the director's investment in the bank.

Under the doctrine applied in those cases above discussed, which were relied upon by the respondent and by the Circuit Court of Appeals, the maker of a promissory note given to a public banking institution in order to con-

ceal a worthless asset or an illegal transaction, with the intent that it should have the appearance of a sound asset of the bank and be so regarded by the bank examiners and thus avoid the application of correctives by the Comptroller of the Currency (or comparable state authority) can escape liability, after the bank becomes insolvent, by pleading lack of consideration and setting up a secret understanding between the maker and officers of the bank to the effect that he would not be held liable on the note.

The Circuit Court of Appeals has extended this principle, which we believe to be wholly unsound, to enable a conspiring director, who has a financial interest at stake and stands to benefit by the deception, to escape liability on the same grounds.

This doctrine, if allowed to stand by this Court, would materially reduce the effectiveness of the Comptroller of the Currency and his examiners in the administration of the national banking system for the protection of the public, and to that extent would defeat the very ends for which Congress granted the Comptroller such powers with respect to national banks. It would make it possible for a national bank to be despoiled by a conspiracy of officers and directors of the bank, and when the Government, as the guardian of the interests of the depositors, stepped in to salvage such assets as then remained, the conspiring officers or directors, whose promissory obligations were the instruments of the fraud, could escape liability by asserting that the obligations were not supported by any real consideration, or that a faithless bank official had agreed, purportedly on behalf of the bank, that the obligations would not be enforced and would be utilized merely for the purpose of deceiving the examiners.

In brief, certain inferior federal courts have drawn from the *Rankin* decision a general rule to the effect that in no circumstances can the receiver of an insolvent bank enforce obligations which could not have been successfully enforced

by the bank as a going institution. Specifically, they have held that the defense of absence of consideration may be interposed to escape liability on a note or other obligation deliberately executed and delivered to the bank for the sole purpose of concealing from the public examining authorities either financial weakness or violations of law. We believe that the facts of the *Rankin* case show that no such general rule was intended to be stated therein; but in any event such a rule would be unsound in principle and inevitably productive of undesirable results.

However, in this case it is not essential, although desirable, that the Court disapprove these decisions *in toto*. Unlike all of the precedents cited by the Circuit Court of Appeals, the instant case is against a defendant who was a director of the bank, sworn to "diligently and honestly administer the affairs of such association", and with a substantial financial benefit to be derived from the illegal deception in which he took a leading part. In these circumstances, involving flagrant breach of trust and motives of personal benefit, liability should certainly be imposed, even if escape were to be allowed in situations not involving such a high degree of culpability or motives of personal advantage. As shown below, **liability has been imposed in every discovered decision of the federal and state courts relating to directors of state or national banking institutions.**

In addition to its reference to the federal court cases discussed above, the Circuit Court of Appeals stated that its conclusion was supported by "all the cases bearing upon the liability of the maker of such a note given to a national bank for its accommodation, to enable it to conceal from a national bank examiner and the Comptroller of the Currency its true financial condition". It is respectfully submitted that this statement is completely erroneous. As shown in the following section, the overwhelming weight of the authorities concurs in imposing liability in this situation, in connection with both national and state banks.

A number of decisions involving national banks are collected on page 38, note 20, *infra*.

(C) The authorities support the position of the petitioner, and clearly reflect a policy underlying our public banking systems to protect the depositors and creditors of banks from such spurious transactions.

In showing that the overwhelming weight of authority is contrary to the position taken by the Circuit Court of Appeals, we will refer to the decisions of both state and federal courts in cases involving insolvent state banks as well as insolvent national banks, because all the states have banking systems in general similar, in their organization and operation, to the national banking system.*

Before entering into a discussion of those cases which have dealt with problems similar to the one before this Court, we wish to point out that the ruling of the Circuit Court of Appeals that the rights of the receiver of an insolvent national bank are in no way superior to the rights of the bank itself, is in conflict with the principle applied by the Court in *Texas & Pacific Ry.* v. *Pottorff*, (1934) 291 U. S. 245. See also *McCandless, Receiver* v. *Furland*, (1935) 296 U. S. 140, 159, 160.

The decision in the *Pottorff* case upheld the right of a receiver of an insolvent national bank to recover securities which the bank had illegally pledged to secure deposits by the railroad. This Court rejected the argument that the receiver was the representative of the bank alone and as such could "have no greater right" than the bank. It recognized that the receiver of an insolvent national bank may in some circumstances be entitled to enforce rights which the bank, as a going institution, could not have enforced, stating that "even if the bank would have been estopped from asserting lack of power, its receiver would be free to challenge the validity of the pledge" (291 U. S. at 260).

In addition, the Court pointed out that "It is the duty of the receiver of an insolvent corporation to take steps to

* See 11 Encyc. Social Sciences (1933) 186, 14 *Id.* (1934) 333.

set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, *even though the corporation itself was not in a position to do so*" (291 U. S. at 264; italics added).

McCandless, Receiver v. *Furland, supra*, raised the question of the right of the receiver of an insolvent corporation to recover from its promoters unconscionable profits obtained by selling land to it and marketing its securities. This Court held that the rights of creditors rose superior to a fraudulent attempt by the corporation and its insiders to impair its assets. "If the shareholders and the directors had combined with the promoters to despoil the corporation and defeat the remedies of creditors by a gift of half the assets, the gift could have been annulled either by the creditors directly or in their behalf by a receiver" (296 U. S. at 159). Again it was recognized that the creditors of a corporation, represented by its receiver, can assert right which might not be enforceable by the corporation as a going concern. Although a minority of this Court contended that "The receiver's rights could rise no higher" than the corporation's rights (page 171), the majority rejected that viewpoint, and stated:

> "There is no occasion to consider whether the corporation itself at the instance of new shareholders would be permitted to disaffirm the fraud and maintain a suit in equity for appropriate relief. We put that question by. *Enough that the receiver has the requisite capacity.*" (296 U. S. at 160; italics added.)

Turning to the decisions upon the question here involved, we find that the earliest federal case sustaining the petitioner's position is *Paulv. O'Brien*, (C. C. S. D. Cal. 1895) 69 Fed. 460. In that case it was held that the receiver of

"It should be mentioned that some of the leading decisions of this question by the highest courts of the several states reflect a tendency to hold such a note as that involved in this case enforceable not only by the receiver, but by the bank itself. See cases cited in note 14 on page 30, *infra*.

an insolvent national bank could recover on a promissory note which the maker had given to the bank in order to enable the bank to remove from its assets a note which was considered practically worthless. The court said (at page 461):

> "It will never do for the courts to hold that the officers of a bank, by the connivance of a third party, can give to it the semblance of solidity and security, and, when its insolvency is disclosed, that the third party can escape the consequences of his fraudulent act."

Lyons v. *Westwater*, (C. C. A. 3rd, 1910) 181 Fed. 681 and (1912) 193 Fed. 817, presented a situation very similar to that of the instant case. The receiver of the insolvent Cosmopolitan National Bank brought action upon a promissory note which had been used to conceal from the Comptroller of the Currency the fact that 300 shares of the bank's capital stock had not been sold and paid for, as required by law, but were held by the bank in the name of one of its officers. Westwater, the maker of the note, defended on the ground that the note was given without consideration and for the accommodation of the bank. It was held that if the maker executed the note with knowledge that it was to be used to deceive the Comptroller of the Currency, the receiver was entitled to enforce it against him.[10]

It should be noted that Westwater, unlike the defendant in the instant case, was neither a director nor a share-

[10] In *Westwater* v. *Murray*, (C. C. A. 6th, 1917) 245 Fed. 427, a decision relating to a subsequent development of this case, the court stated:

> "The vital question of fact to be determined at the third trial of the case was, as Judge Gray stated, whether Westwater had 'any knowledge of the facts in regard to the use in which his paper (the note in suit) was to be put, as would make him a participant in the deception undoubtedly practiced by the officers of the bank upon the Comptroller of the Currency.' *Westwater* v. *Lyons*, 193 Fed. 823 • • • "

holder of the bank, nor interested in it in any other way, but was drawn into the picture by a friend, one of the directors of the bank, who persuaded him to "lend" it his note. *A fortiori* liability should be imposed where, as here, the maker of the note was not only aware of the deception to be practiced on the public examining authorities, but was a director and shareholder of the bank with a pecuniary interest to be served by the scheme in which he participated.

Federal Reserve Bank v. *Crothers*, (C. C. A. 4th, 1923) 289 Fed. 777, is particularly significant. The president of a national bank had persuaded Crothers to give the bank his note for $6,000 "to take the place of an equivalent of electric light plant bonds [constituting an excessive investment] for the satisfaction of the bank examiner". The bank failed, and the court held the receiver had the right to enforce the note. Counsel for the defendant relied upon *Rankin* v. *City National Bank*, *supra*. Although the court (Taft, Circuit Justice, Woods, Circuit Judge, and Groner, District Judge) distinguished the *Rankin* case, the decision indicates a disposition to confine the holding in that case to the particular facts there presented. The court stated (at page 779) that "public policy requires that the maker be estopped from denying his liability under such circumstances".

A similar view of the law was taken by the Circuit Court of Appeals for the Fifth Circuit in the case of *Bohning* v. *Caldwell*, (C. C. A. 5th, 1925) 10 F. (2d) 298, *cert.* denied (1926) 271 U. S. 663. The receiver of an insolvent national bank sued several of its directors on a note made by them and given to the bank to take the place of certain doubtful or worthless assets; "none of the makers of the note considered they would ever be called upon to pay it". The court held the note to be enforceable on the ground that

since the makers of the note were directors[1] and stockholders of the bank there was sufficient consideration for the note, and also that the directors were estopped to deny consideration. This decision is of particular significance inasmuch as in the course of its opinion the court referred to the case of *Pauly* v. *O'Brien*, *supra*, as stating the sound doctrine, after having considered and referred to the line of cases represented by *Peterson* v. *Tillinghast*, (C. C. A. 6th, 1931) 192 Fed. 287, which, as previously noted, purports to rest upon the *Rankin* case and which was relied upon by the Circuit Court of Appeals in the instant case.

Four years later the same Circuit Court of Appeals, composed of the same Circuit Judges (Walker, Bryan and Foster), reached the opposite conclusion in *Lensing* v. *Rayzor*, (C. C. A. 5th, 1930) 41 F. (2d) 224, *cert.* denied (1930) 282 U. S. 870, but in that case the note was executed in good faith by an outsider who was wholly unacquainted with banking business and was in entire ignorance of the fact that the note was to be used in a transaction designed to represent a fictitious sale of twenty shares of the bank's own stock. The court took special care to point out that the maker was not a stockholder, **director**, or officer, thus indicating clearly that in circumstances such as exist in the instant case, where the note was executed by a director of the bank who had full knowledge of the illegality of the transaction, it would have applied its previous decision in *Böhning* v. *Caldwell*, *supra*. The court stated that under certain circumstances the fulfillment of a duty by an officer of a bank is sufficient consideration for an accommodation note.

[1] The National Bank Act requires that

"Each director, when appointed or elected, shall take oath that he will, so far as the duty devolves upon him, diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated any of the provisions of this title, * * * ". (Sec. 5147 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 73)).

Attention is also directed to *Utley* v. *Clarke, et al.*, (D. N. Y. 1936) 16 F. Supp. 435, where the court adopted the view of the law here contended for by the petitioner. In that case a director sought to recover from the receiver of an insolvent national bank certain securities which he had placed in the custody of the bank's officers for the purpose of giving them the appearance of assets of the bank. The court held the plaintiff estopped to assert this claim, since he had been a party to the deception of the Comptroller of the Currency, and of the depositors and creditors of the bank. The decision recognizes that the real parties in interest in these cases are the depositors and creditors, although the receiver is the party to the suit in their interest.

The appellate courts of a majority of the states have considered the question of the rights of the receiver of an insolvent banking institution with respect to promissory notes given to it for inclusion in its purported assets in order to deceive the public examining authorities. These decisions of the state courts have related to both national and state banks. The notes involved in such cases were used for various deceptive purposes: to conceal illegal holdings by a bank of its own stock, to "reduce" excessive loans, to "eliminate" unsound or criticized assets, and for numerous other reasons bearing on the soundness of the bank's financial position. Almost without exception, the courts of these jurisdictions have upheld the rights of the depositors and creditors represented by the receiver. Several different theories have been developed and advanced to support this result, but the outstanding fact is the uniformity with which the courts have concluded that persons in Greaney's position must not be permitted to escape liability.[12]

[12] In addition to the cases cited hereinafter in this section, see *Fischer* v. *Hammond*, (1927) 32 Ariz. 423, 259 Pac. 676; *Ashley* v. *Rowe*, (1931) 101 Fla. 140, 133 So. 551; *Boller* v. *Field*, (1931) 260 Ill. App. 488, 492; *Nelson* v. *Colegrove*, (1932) 265 Ill. App. 488; *German-American State Bank* v. *Watson*, (1917) 99 Kan. 686, 163 Pac. 637; *Bank of Slater* v. *Union Station Bank*, (1920) 283

In some jurisdictions it has been held that adequate consideration exists for notes thus given to banks, especially where the maker is a director and shareholder, as in this case. This was the primary basis of decision in *New* v. *Page* (1924), 144 Md. 606, 125 Atl. 403; *Hurd* v. *Kelley* (1879), 78 N. Y. 588; *State ex rel. Lattanner* v. *Hills* (1916), 94 Ohio St. 171, 113 N. E. 1045; *First National Bank* v. *Boxley* (1927), 129 Okla. 159, 264 Pac. 184; *Arthur* v. *Brown* (1912), 91 S. C. 316, 74 S. E. 652.

Other courts have decided on principles of estoppel that such a defendant may not be heard to deny the validity of the note which he gave for the very purpose of deceiving examiners and depositors. However, few courts have deemed it necessary to work out all the elements of technical estoppel; it is simply stated that in these circumstances the maker of the note is "estopped" to contradict the validity of his note by evidence of a secret agreement not to enforce it. *Day* v. *Farmers' & Merchants' Bank* (1924), 229 Ala. 372, 157 So. 439; *Murphy, Receiver* v. *Gumaer* (1902), 18 Colo. App. 183, 70 Pac. 800; *Iglehart* v. *Todd* (1931), 203 Ind. 427, 178 N. E. 685; *Hayes* v. *Addy* (1934), 139 Kan. 481, 32 P. (2d) 243; *Bell* v. *Johnson* (1935), 142 Kan. 360, 46 P. (2d) 886; *Denny* v. *Fishter* (1931), 238 Ky. 127, 36 S. W. (2d) 864; *German-American Finance Corporation* v. *Merchants' and Manufacturers' State Bank* (1929), 177 Minn. 529, 225 N. W. 891; *Best* v. *Thiel* (1879), 78 N. Y. 15; *Bay Parkway National Bank* v. *Shalow* (1936), 270 N. Y. 172, 200 N. E. 685; *Peterson* v. *Baird* (1933), 63 N. D. 604, 249 N. W. 690; *Shaw* v. *Borchers* (Tex. 1932), 46 S. W. (2d) 967.

Mo. 308, 320, 222 S. W. 993, 996; *Mt. Vernon Tr. Co.* v. *Bergoff*, (1936) 272 N. Y. 192, 5 N. E. (2d) 196; *Engen* v. *Matthys*, (1923) 50 N. D. 487, 196 N. W. 550; *Brand* v. *Korth*, (Tex. 1936) 99 S. W. (2d) 285; *First Nat. Bank* v. *Brownson*, (Tex. Civ. App. 1937) 106 S. W. (2d) 1076; *West Rutland Tr. Co.* v. *Houston*, (1932) 104 Vt. 204, 158 Atl. 69; *Webb* v. *Pleasants*, (1926) 144 Va. 516, 519; 132 S. E. 175, 176; *Moore* v. *Kildall*, (1920) 111 Wash. 504, 191 Pac. 394; *Schwenker, Commissioner of Banking* v. *Teasdale*, (1931) 206 Wis. 275, 239 N. W. 434.

A third group of courts has held that the result is required by public policy, and that to permit schemes of this sort to be carried out without liability would weaken and jeopardize the banking structure of the country and popular confidence therein.[13] Only a few of the decisions in this field are based exclusively upon public policy or upon any one of the other theories which have been used to support the result reached. For example, in *Schmid* v. *Haines* (1925), 115 N. J. L. 271, 178 Atl. 801, the court enforced the note on the ground of "estoppel", but continued: "This estoppel is rooted in what has been termed 'good morals and sound public policy'." Accord: *Niblack* v. *Farley* (1919), 286 Ill. 536, 122 N. E. 160; *Cedar State Bank* v. *Olson* (1924), 116 Kan. 320, 226 Pac. 995; *Parker* v. *Parker* (1938), 287 Mich. 49, 282 N. W. 897; *Vallely* v. *Devaney* (1923), 49 N. D. 1107, 194 N. W. 903; *Putnam* v. *Chase* (1923), 106 Ore. 440, 212 Pac. 365; *Lyons* v. *Benney* (1911), 230 Pa. 117, 79 Atl. 250; see *Rothschild* v. *Manufacturers Trust Company* (1939), 279 N. Y. 355, 18 N. E. (2d) 527. It is submitted that reasons of public policy underlie the extension of the doctrines of estoppel and consideration in many decisions to encompass transactions of this nature. See Brannan, Negotiable Instruments Law (6th Ed. 1938) 459.

There is considerable divergence of opinion as to whether a going bank may enforce such notes on its own behalf,[14]

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[13] See Section D; *infra*.

[14] Going bank may enforce: *Rogers* v. *First State Bank*, (1926) 79 Colo. 84, 243 Pac. 637; *Cedar State Bank* v. *Olson*, (1924) 116 Kan. 320, 226 Pac. 995 (cf. *Farmers' State Bank* v. *Montgomery*, (1929) 129 Kan. 203, 282 Pac. 741); *State Bank of Moore* v. *Forsyth*, (1910) 41 Mont. 249, 108 Pac. 914; *Bay Parkway Nat. Bank* v. *Shalom*, (1936) 270 N. Y. 172, 200 N. E. 685; *First National Bank* v. *Boxley*, (1927) 129 Okla. 159, 264 Pac. 184; *Bangor Trust Co.* v. *Christine*, (1929) 297 Pa. 64, 146 Atl. 545; *Warren National Bank* v. *Jamieson*, (1930) 301 Pa. 45, 151 Atl. 672; *Farmers' & Merchants' State Bank* v. *Perry*, (1925) 186 Wis. 93, 202 N. W. 179; See Brannan, Negotiable Instruments Law (6th ed. 1938) 454-457.

but no question appears to exist as to the liability of a director and shareholder of a bank who delivers his note to it for the very purpose of deceiving the examining authorities, where the deception continues until the bank's subsequent insolvency, and suit is brought on the note by the receiver for the benefit of the depositors and creditors.[15]

The following list, it is believed, includes all the reported decisions in this field which involve directors or persons occupying similar positions. Liability was imposed in every case. *Cedar State Bank* v. *Olson* (1924), 116 Kan. 320, 226 Pac. 996; *New* v. *Page* (1924), 144 Md. 606, 125 Atl. 403; *Prudential Trust Co.* v. *Moore* (1923), 245 Mass. 311, 139 N. E. 645; *International Trust Co.* v. *Wattendorf* (1926), 256 Mass. 323, 152 N. E. 306; *Parker* v. *Parker* (1938), 287 Mich. 49, 282 N. W. 897; *Skordal* v. *Stanton* (1903), 89 Minn. 511, 95 N. W. 449; *Hurd* v. *Kelley* (1879), 78 N. Y. 588; *Best* v. *Thiel* (1879), 78 N. Y. 15; *Peterson* v. *Baird* (1933), 63 N. D. 604, 249 N. W. 690; *State Bank of Pittsburg* v. *Kirk* (1907), 216 Pa. 452, 65 Atl. 932; *Skagit State Bank* v. *Moody* (1915), 86 Wash. 286, 150 Pac. 425; *Farm-*

Contra (*i.e.*, receiver may recover, but going bank may not): *Day* v. *Farmers' & Merchants' Bank*, (1934) 229 Ala. 372, 157 So. 439; *First Nat. Bank* v. *Reed*, (1926) 198 Cal. 252, 244 Pac. 368; *Murphy, Receiver* v. *Gumaer*, (1902) 18 Colo. App. 183, 70 Pac. 800; *Niblack* v. *Farley*, (1919) 286 Ill. 536, 122 N. E. 160, *semble*; *Golden* v. *Červenka*, (1917) 278 Ill. 409, 116 N. E. 273, 282, 283; *Myers* v. *Department of Financial Institutions*, (Ind. 1938) 14 N. E. (2d) 914; *Hayes* v. *Addy*, (1934) 139 Kan. 481, 32 P. (2d) 243; *Denny* v. *Fishter*, (1931) 238 Ky. 127, 36 S. W. (2d) 864; *German-American F. Corp.* v. *Merchants' & Manufacturers' Bank*, (1929) 177 Minn. 527, 225 N. W. 891; *Harrington* v. *Connor*, (1912) 51 Neb. 214, 70 N. W. 911; *Park Place Discount Co.* v. *Taylor*, (1937) 119 N. J. L. 253, 195 Atl. 520, *semble*; *Putnam* v. *Chase*, (1923) 106 Ore. 440, 212 Pac. 365; *Lyons* v. *Benney*, (1911) 230 Pa. 117, 79 Atl. 250; see note (1924) 38 *Harv. L. Rev.* 239; (1937) 4 *Univ. of Chic. L. Rev.* 484.

[15] See (1932) 45 *Harv. L. Rev.* 926.

ers' & Merchants' State Bank v. *Perry* (1925), 186 Wis. 93, 202 N. W. 179.[18]

It is submitted that despite the presence or absence of express reference thereto in the opinions, all of the decisions cited above have a single underlying basis: *i. e.*, sound public policy. The uniformity of the results reached in those cases evidences the existence of a policy underlying all public banking systems to guard against transactions (particularly on the part of bank officers and directors) designed to deceive the examining authorities and, through them, the depositors and the public.

(D) The provisions of the National Bank Act, especially with respect to examination and supervision of national banks by the Comptroller of the Currency, definitely indicate the existence of a policy to protect bank depositors and creditors, and the public, from such transactions.

There is no federal statutory provision expressly and specifically relating to the question here presented. However, the Acts of Congress relating to national banks evidence a purpose or underlying policy to assure effective examination, regulation, and supervision of such banks by the Comptroller of the Currency and his examiners. This basic policy must be recognized as an intrinsic, although implied, part of the National Bank Act, and problems arising in connection with such examination and supervision are, therefore, governed by the federal bank law rather than by the general law of the particular state in which the bank is located.[18a]

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[18] The District Court opinion in the instant case pointed out that

> "Greaney was a director of the old Boston bank as well as of the new Boston-Continental, and, as such, is chargeable with a higher degree of responsibility than either Karnow or Mahoney. • • • He was a director of the bank, • • • he had a more intimate knowledge of the transaction than either Karnow or Mahoney, and • • • he owed a duty to the depositors of the bank to protect their interests" (R. 16).

[18a] See *Cook County Nat. Bank* v. *United States*, (1882) 107 U. S. 445, 448, stating that the National Bank Act constitutes "by itself a complete system for the establishment and government of national banks."

The question presented by this case bears directly upon the effectiveness of the examining and supervisory functions of the Comptroller of the Currency, and consequently is of great importance with respect to the stability and proper management of the institutions which make up our public banking system. As was pointed out in the dissenting opinion in *Deitrick* v. *Standard Surety Company* (1938), 303 U. S. 471, 481, it has long been recognized that even in the case of a going bank the rights of depositors and the public would be jeopardized unless given protection in addition to that afforded by the bank's officers elected by the stockholders. The most effective measure employed by the Government to protect the depositors and the public from just such hazardous departures from sound and safe banking practices is the conduct of thorough periodic examinations by national bank examiners appointed by the Comptroller and the requirement that national banks submit periodic reports to the Comptroller. Sections 5240 and 5211 of Rev. Stat. of 1873, as amended (U. S. C. title 12, secs. 481 and 161, respectively. See Appendix). This objective of the legislation would be frustrated if officers and directors of national banks could with impunity conspire to deceive and trick bank examiners.

The foundation of every banking system is public confidence. In view of the system of examination adopted by Congress, the mere fact that a national bank is open can be considered as a continuing invitation to the public to rely on its soundness and to feel assured that the Comptroller and his examiners deem the bank sound and honestly administered. The depositors and creditors have no power regarding the operation or management of a national bank and have no means of knowing the soundness of a bank except by reliance upon the statements publicly issued from time to time as prescribed by the Comptroller of the Currency and upon other action taken by the Comptroller for their protection. Therefore, it is imperative that the assets recorded on the public statements and the

notes and other obligations carried in the bank as assets thereof be genuine and enforceable obligations, so that examination will reveal the true condition of the bank. A rule of law permitting a director of a national bank to escape liability to the depositors and creditors of such a bank (or a receiver acting for their benefit) where the director, as a part of a conspiracy with other bank officials to deceive the Comptroller and his examiners, and through them the public, as to the true condition of the bank, and to conceal from them the commission of a highly dangerous violation of the banking laws,[17] has placed among the assets of the bank an obligation *prima facie* valid and enforceable but subject to a secret agreement that it was not to be enforced, would defeat the entire purpose of the regulatory statutes and would be in conflict with sound public policy.

That this question is a matter of unusual public concern has been recognized increasingly in recent years, as indicated by the tendency of courts to rely less upon the technical doctrine of estoppel, but rather to deny to the maker of an obligation such as that involved in this case the right to set up a defense such as that claimed by Director Greaney, upon the broad principle of public policy that the stability of banks and public confidence in our banking structure must not be jeopardized by spurious transactions of this character. The change in emphasis is clearly reflected in two important decisions handed down during the current year. In *O'Keefe* v. *Equitable Trust Co.* (C. C. A. 3d, 1939), 103 F. (2d) 904, 908, the court said:

> "And again, a fortiori, will the policy apply to banks, institutions whose raison d'etre should guarantee the identity of reality and appearance. As a distinguished

[17] In order to protect the public from a practice which, if permitted, would dangerously impair the capital of national banks, the National Bank Act prohibits such banks from purchasing shares of their own capital stock, as was done in this case. See page 2, note 1, *supra*.

court and a learned professor of law put it: 'The state cannot sanction any device intended to give a false appearance to a transaction or increase the apparent stability of a bank, * * * Public policy requires that a person who, for the accommodation of the bank executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously, the parties agreed that the instrument should not be enforced.' Mount Vernon Trust Co. v. Bergoff, 272 N. Y. 192, 197, 5 N. E. (2d) 196, 197.

"* * * It is interesting to observe that the later cases place their decisions squarely on the ground of public policy and do not strain at an enlarged concept of consideration or an hypothetical estoppel."

And in *Rothschild* v. *Manufacturers Trust Co.* (1939), 279 N. Y. 355, 359, 18 N. E. (2d) 527, 529, the Court of Appeals of New York forcibly enunciated the same principle:

"An agreement, valid and enforcible if made by an ordinary corporation or business, may, by reason of public policy, be void and unenforcible against a banking institution. Thus, where a bank brings suit on a promissory note, the defendant may not plead lack of consideration and an agreement not to enforce the instrument, since the defendant knows or was chargeable with knowledge that the note might be used to conceal the actual transaction. * * * The public policy behind these rulings is that the stability of banks is a matter of such public concern that the State should not sanction any device intended to give a false appearance to a transaction or increase the apparent stability as contrasted with the true condition of a bank."

To the effect that the business of banking is affected with a public interest and that public policy requires the state to take the necessary steps by way of regulation, supervision, and restriction, as a matter of public policy, to protect the depositors and insure the soundness of banks and that the statutes passed in that connection are designed for that purpose. See: *Noble State Bank* v. *Haskell*, (1911), 219 U. S. 104, 111-13; *Easton* v. *Iowa*, (1903), 188 U. S. 220, 238; *Guthrie* v. *Harkness*, (1905), 199 U. S. 148, 158.

III.

If This Case is Governed by the Law of Massachusetts, the Decision of the Circuit Court of Appeals Should be Reversed Because Contrary to the Controlling Decisions of the Supreme Judicial Court of Massachusetts.

If this Court determines that the situation here presented is not governed by the National Bank Act on the basis set forth in the preceding section of this brief, then the interpretation, validity and enforcedability of the note, which was executed in, and payable in, Massachusetts, are governed by the law of that State, under the doctrine of *Erie R. Co.* v. *Tompkins*, (1938) 304 U. S. 64, and *Ruhlin* v. *New York Life Insurance Co.*, (1938) 304 U. S. 202.

The suit here involved was instituted by the receiver of a national bank to enforce a promissory note executed by a director of the bank (R. 4-5), who seeks to avoid liability by asserting a defense based on lack of consideration and illegality (R. 9). Thus the question presented to this Court is whether in view of the circumstances, interests and persons involved, the defendant may interpose such a defense in such suit. It is the contention of the petitioner that Greaney is not entitled to defend on these grounds as against the receiver as representative of the depositors and creditors of the Boston-Continental National Bank, to which Greaney gave his note to deceive the public examining authorities.

The common law rule of the State of Massachusetts applicable to those facts is such that if it had been applied by the Circuit Court of Appeals, the decree of the District Court holding Greaney liable on the note here in question necessarily would have been affirmed.

The controlling decision in Massachusetts is *Prudential Trust Co.* v. *Moore*, (1923) 245 Mass. 311, 139 N. E. 645. In that case, directors of a bank executed and delivered promissory notes to it in order to replace certain excessive loans on the books of the bank and thereby "to prevent the closing of the bank", the makers having been assured by the president of the bank "that they were really assuming

no liability at all". Thereafter, the bank was closed, insolvent, with these notes ostensibly among its assets. After pointing out that the defendants not only had a financial interest as stockholders in maintaining the solvency of the bank, but as directors they were under a legal responsibility akin to that of trustees, thus supplying consideration for their notes, the Supreme Judicial Court of Massachusetts held the directors "estopped from denying the legal validity of these notes which the bank commissioner is now attempting to collect for the benefit of creditors of the bank." The Court stated that it would be unjust and fraudulent to permit these directors "to now plead the invalidity of the very securities by which they induced others to make and leave deposits with the bank". Accordingly, the Court held that the public officials representing the bank's depositors and other creditors were entitled to enforce the notes.

In *International Trust Co. v. Wattendorf* (1926), 256 Mass. 323, 152 N. E. 306, in deciding a similar case, the Supreme Judicial Court of Massachusetts stated that a note given by a **director** to a banking institution to take the place of another note which had been previously substituted for illegal investments, was not without consideration, since the director was interested in the prosperity of the bank, the value of his stock depended on its success and continued operation, and the suspension of the bank not only might mean the loss of his investment but also might subject him to liability as a director and as a stockholder.

The pertinent facts of the instant case are almost identical with those of *Prudential Trust Co.* v. *Moore*, *supra*, and *International Trust Co.* v. *Wattendorf*, *supra*, even to the extent that Greaney, the maker of the note, was a director of the bank,[18] as were the defendants in those cases. In fact, the circumstances of the present case even more strongly call for imposing liability on the maker of the

[18] Under Section 5146 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 72), as then in force, every director of a national bank the size of the Boston-Continental National Bank must have owned capital stock of the association having an aggregate par value of not less than $1,000.

note: In the *Prudential Trust Co.* case the directors were told by the bank president that "the situation involved simply a technical question" and could be cleared up in a few days, whereas in this case Greaney was entirely aware that the bank had acquired its own stock in violation of law and desired to conceal this fact from the bank examiners, the Comptroller of the Currency, and through them, the depositors and other creditors of the bank.

A decision of this Court holding that the law of Massachusetts is applicable to this case would find support in the significant fact that neither the federal court decisions relied upon by the Circuit Court of Appeals, nor any other decisions of the federal courts which are in accord therewith, have been based upon a consideration of specific provisions of the National Bank Act.[19]

It may also be of significance to this Court that the question here presented is not one with reference to which the state courts have felt obliged to ascertain and apply a federal rule in cases where a receiver of a national bank was involved. On numerous occasions this and analogous questions have been decided by state courts with respect to both national and state banks, and liability has been imposed without reference to any specific statutory provision or to any policy inferred from a specific legislative enactment. In the decision of such cases, the highest courts of the various states have invariably applied the same rules of law in cases where a receiver of a national bank was involved as in cases where a receiver of a state bank was involved.[20]

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[19] See cases cited in Section B, *supra*.

[20] See *Day* v. *Farmers & Merchants Bank*, (1934) 229 Ala. 372, 157 So. 439; *First Nat. Bank* v. *Reed*, (1926) 198 Cal. 252, 244 Pac. 368; *First Nat. Bank* v. *Felt*, (1897) 100 Iowa 680, 69 N. W. 1057; *Hayes* v. *Addy*, (1934) 139 Kan. 481, 32 P. (2d) 243; *Bay Parkway Nat. Bk.* v. *Shalom*, (1936) 270 N. Y. 172, 200 N. E. 685; *First Nat. Bk.* v. *Boxley*, (1927) 129 Okla. 159, 264 Pac. 184; *Lyons* v. *Bonney*, (1911) 230 Pa. 517, 79 Atl. 250; *First Nat. Bank* v. *Baer*, (1923) 277 Pa. 184, 120 Atl. 815; *First Nat. Bank* v. *Sagerson*, (1925) 283 Pa. 406, 129 Atl. 333; *Warren Nat. Bank* v. *Jamieson*, (1930) 301 Pa. 45, 151 Atl. 672; *First Nat. Bank* v. *Smith*, (Pa. 1938) 200 Atl. 215; *Federal American National Bank & Trust*

CONCLUSION.

It is respectfully urged that the Circuit Court of Appeals for the First Circuit erred in overruling the decision of the District Court, wherein judgment was rendered in favor of the receiver and against Director Greaney upon the note indebtedness here involved. It is submitted that the protection of the national banking system and the ends of justice demand that relief be granted to the receiver in aid of the depositors and other creditors of the bank, and that the final decree of the Circuit Court of Appeals for the First Circuit be reversed.

Respectfully submitted,

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Co. v. *Scott*, (Tex. Civ. App. 1937) 103 S. W. (2d) 1064. In *Lyons* v. *Benney*, *supra*, a national bank case very similar to the one now before the Court, the Supreme Court of Pennsylvania, referring to two of its own decisions involving state banks (*State Bank of Pittsburg* v. *Kirk*, 216 Pa. 452, and *Peoples Bank* v. *Stroud*, 223 Pa. 33), stated (230 Pa. at 117):

> "In each of them we held that the appellee, as receiver of an insolvent state bank, represented not only it, but its creditors, and counsel for the appellant have failed to convince us that the same rule does not apply to a receiver of a national bank appointed by the Comptroller of the Currency. Nor have we been persuaded that only directors or trustees of a corporation who have given notes for the purpose of increasing its assets or restoring its capital, should not be allowed to set up want of consideration in an action on the obligations by a receiver."

APPENDIX.

Sec. 5138 of Rev. Stat. of 1873, as amended (U. S. C. title 12 sec. 51):

> No national banking association * * * shall be organized in a city the population of which exceeds fifty thousand persons with a capital of less than $200,000 * * *.

Sec. 5139 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 52):

> The capital stock of each association shall be divided into shares of $100 each, or into shares of such less amount as may be provided in the articles of association, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired.

Sec. 5140 of Rev. Stat. of 1873 (U. S. C. title 12, sec. 53):

> At least 50 per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in installments of at least 10 per centum each, on the whole amount of the capital, as frequently as one installment at the end of each succeeding month from the time it shall be authorized by the Comptroller of the Currency to commence business; and the payment of each installment shall be certified to the comptroller, under oath, by the president or cashier of the association.

Sec. 5141 of Rev. Stat. (U. S. C. title 12, sec. 54):

> Whenever any shareholder, or his assignee, fails to pay any installment on the stock when the same is required by the preceding section to be paid, the directors

of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be canceled and deducted from the capital stock of the association. If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions of section fifty-two hundred and thirty-four, to close up the business of the association. [Sec. 5234 of Rev. Stat. of 1873, as amended, appears as Sec. 192 of the U. S. Code.]

Sec. 5146 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 72):

* * * Every director must own in his own right shares of the capital stock of the association of which he is a director the aggregate par value of which shall not be less than $1,000, unless the capital of the bank shall not exceed $25,000 in which case he must own in his own right shares of such capital stock the aggregate par value of which shall not be less than $500. Any director who ceases to be the owner of the required number of shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place.

Sec. 5147 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 73):

> Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated any of the provisions of this title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this title, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. • • •

Sec. 5201 of Rev. Stat. of 1873 (U. S. C. title 12, sec. 83):

> No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section 192 of this title.

Sec. 5204 of Rev. Stat. of 1873 (U. S. C. title 12, sec. 56):

> No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. • • •

Sec. 5205 of Rev. Stat. of 1873 (U. S. C. title 12 sec. 55):

> Every association which shall have failed to pay up its capital stock, as required by law, and every associa-

tion whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four. [Sec. 5234 of Rev. Stat. of 1873, as amended, appears as Sec. 192 of the U. S. Code.]

Sec. 5209 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 592):

Any officer, director, agent, or employee * * * of any national banking association * * * who makes any false entry in any book, report, or statement of * * * such national banking association * * *, with intent in any case * * * to deceive * * * the Comptroller of the Currency, * * * or any agent or examiner appointed to examine the affairs of * * * such national banking association * * *, and every person who, with like intent, aids or abets any officer, director, agent, employee, or receiver in any violation of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States shall be fined not more than $5,000 or shall be imprisoned for not more than 5 years, or both, in the discretion of the court.

Sec. 5239 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 93):

If the directors of any national banking association shall knowingly violate, or knowingly permit any of

the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district, or Territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

Sec. 5240 of Rev. Stat. of 1873, as amended (U. S. C. title 12, secs. 481 and 484):

The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every member bank at least twice in each calendar year and oftener if considered necessary * * *. The examiner making the examination of any national bank, or of any other member bank, shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency.

* * * * *

No bank shall be subject to any visitatorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized.

Sec. 5211 of Rev. Stat. of 1873, as amended (U. S. C. title 12, sec. 161):

Every association shall make to the Comptroller of the Currency not less than three reports during each year, according to the form which may be prescribed

by him, verified by the oath or affirmation of the president, or of the cashier, or of a vice president, or of an assistant cashier of the association designated by its board of directors to verify such reports in the absence of the president and cashier, taken before a notary public properly authorized and commissioned by the State in which such notary resides and the association is located, or any other officer having an official seal, authorized in such State to administer oaths, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified, and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him; and the statement of resources and liabilities, together with acknowledgment and attestation in the same form in which it is made to the Comptroller, shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to obtain a full and complete knowledge of its condition.

SEP 8 1939
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1939.

No. 246.

FREDERICK S. DEITRICK,
RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK,
Petitioner,
v.
THOMAS E. GREANEY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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recover from the defendant Greaney and another the amount of a promissory note signed by the defendant Greaney.

The defendant Greaney, in his answer (R. 7-10), admitted the execution of the notes and transfers of stock described in the plaintiff's bill, but denied that he or Karnow ever became the owners of said stock, and alleged that said transactions were effected at the request of the bank and for its accommodation, that the bank at all times owned the stock, that it was never intended that any of the defendants should become the owners of said stock, and that the successive transfers to Greaney, Karnow and Mahoney were made to secure the maker of the accommodation note or notes held by the bank.

At the trial of the case in the District Court the following facts were found:

Early in 1930 the Boston National Bank, in violation of the National Banking Act, became the owner of 190 shares of its own capital stock. In order to conceal this fact, the bank, acting through one Ulin, its president, induced the defendant Karnow to execute and deliver to the bank for its accommodation his note in the sum of $23,500. Karnow's note was discounted, the proceeds turned over by Karnow to the defendant Greaney, who at that time was a director of the bank, and Greaney in turn paid the money over to the bank. The shares of stock were thereupon transferred upon the books of the bank to Greaney (R. 13, 14).

From time to time Karnow was induced to renew the note given by him to the bank, and shortly after the first renewal he had the stock standing in Greaney's name transferred on the bank's records from Greaney's name to his own and took actual possession of the certificates (R. 14).

In December of 1930 the Boston National Bank was consolidated with the Continental National Bank under the

name Boston-Continental National Bank, and the 190 shares of Boston National Bank stock standing in the name of Karnow became convertible into 684 shares of stock of the consolidated bank, with a par value of twenty dollars ($20) per share, and were so converted. Prior to the consolidation and conversion of the stock, the Boston National Bank had agreed to sell the 190 shares of its own stock to two officers of the Continental National Bank, named Ragan and Balter, at one hundred fifty dollars ($150) a share, and took a series of notes from the purchasers in payment. Three of the notes, totalling twenty-four thousand dollars ($24,000), were delivered to Greaney with instructions to obtain from Karnow shares of stock as paid for by the payment of said notes (R. 14).

In March of 1931 the first Ragan and Balter note, in the amount of nine thousand five hundred dollars ($9500), was paid. Pursuant to the aforesaid instructions, Karnow released 222.8 shares of stock of the consolidated bank for delivery and transfer to the purchasers, and Karnow was credited on the bank's books with the payment of nine thousand five hundred dollars ($9500) on account of his note (R. 14, 15).

In the early part of May, 1931, at the insistence of Karnow, the consolidated bank agreed to deliver up Karnow's note, at the same time inducing the defendant Greaney to substitute his note to the bank in the sum of fourteen thousand five hundred fifty-three dollars and sixty-six cents ($14,553.66), which at that time represented the then unpaid balance of the Karnow note appearing on the bank's books. At or about the same time the stock held by Karnow was surrendered and put in the name of the defendant Mahoney without his knowledge or consent (R. 15).

In December of 1931 the consolidated bank was closed and a receiver appointed, and on July 11, 1932, an assessment was made by the Comptroller against all stockholders

of said bank equal to the par value of their stock, but the assessment upon the 457.2 shares standing in the name of Mahoney was never paid (R. 15).

On June 16, 1938, the court filed an opinion (R. 13-17) wherein certain findings of fact and rulings were made pursuant to which a final decree was entered on June 30, 1938 (R. 12), dismissing the bill as against the defendants Karnow and Mahoney, adjudging the defendant Greaney liable upon a stock assessment in the amount of $9144 with interest as the owner of 457.2 shares of stock standing in the name of the defendant Mahoney, and adjudging him liable to the plaintiff in the sum of $14,553.66, the amount of the promissory note held by the bank, together with interest.

Thereafter, on September 28, 1938, the defendant Greaney appealed to the Circuit Court of Appeals for the First Circuit from the final decree entered on June 30, 1938 (R. 17).

After argument and hearing, the Circuit Court of Appeals on March 25, 1939, rendered an opinion (R. 77-90), and on the same day entered a decree (R. 90) in which it reversed the decree of the District Court in so far as it held the defendant Greaney liable on his note for fourteen thousand five hundred fifty-three dollars and sixty-six cents ($14,553.66), ordered the suit dismissed as to such liability, and affirmed the decree of the District Court in so far as it established the defendant Greaney's liability in the amount of nine thousand one hundred forty-four dollars ($9144), together with interest, as an assessment on 457.2 shares of stock of the Boston-Continental National Bank (R. 90-91).

Thereafter the plaintiff, seeking a review of the decree of the Circuit Court of Appeals, filed a petition for a writ of certiorari with this Honorable Court. The defendant Greaney filed a cross-petition for a writ of certiorari, being docket No. 247, seeking a review of that part of the decree of the Circuit Court of Appeals which adjudged him liable for a stock assessment.

Summary of Argument.

It is submitted that the evidence and the express findings of fact of the District Court disclose that the giving of the note and the bank's apparent relinquishment of the stock constituted only a colorable transaction, and were merely part of a scheme to conceal from the bank examiner the bank's illegal ownership of the stock. The undisputed testimony at the trial of the cause and the findings of the District Court establish that the bank never actually parted with its beneficial ownership of the shares of stock, and that none of the parties intended that the promissory note be considered an actual obligation.

It is respectfully submitted that the portion of the opinion of the Circuit Court of Appeals (R. 77-84) which exempts Greaney from liability on his promissory note is in complete accord with the principles set forth in established decisions to the effect that the receiver of a closed national bank may not recover from the maker of an accommodation note given to the bank at its request and taken by the bank for the purpose of concealing the ownership of shares of its own stock previously acquired by it in violation of law.

In the plaintiff's attempt to hold Greaney liable on his note, great weight is placed upon the fact that Greaney was a director in the bank of which the plaintiff is the receiver. Such argument by the plaintiff might be sound if this were a suit by a receiver of a closed national bank on behalf of its creditors to impose liability on a director for a breach of duty to depositors, but the pleadings do not state such a case. This is merely a suit by a receiver to recover on a note as an asset of the bank. In such a proceeding the fact that the maker of the note was also a director of the payee cannot deprive the maker of his agreement with the payee that the note would not be enforced

against him. Particular attention should be directed to the fact that the bill in equity does not allege, nor is there any evidence or finding, that the giving of the note in suit in any way damaged the bank or its depositors or deceived the bank examiner. The evidence and findings in the case clearly establish that the bank acquired the shares of stock in question considerably before the defendant gave the note in question. The bank gave up nothing and acquired nothing when it took the note in suit. The findings of the District Court clearly show that this note was taken, not to divest the bank of its ownership of the stock, but to conceal its continued ownership. *The giving of the note under such circumstances did not increase or decrease the assets of the bank.*

Despite the contentions of the petitioner, it is clear that the validity and enforcibility of the note in suit is to be governed by Federal court rules of decision and not by Massachusetts law. Furthermore, the decision of the Circuit Court of Appeals does not conflict with decisions of the Massachusetts courts.

Argument.

I.

THE RECEIVER OF A CLOSED NATIONAL BANK MAY NOT RECOVER FROM THE MAKER OF AN ACCOMMODATION NOTE GIVEN TO THE BANK, AT ITS REQUEST, AND TAKEN BY THE BANK FOR THE PURPOSE OF CONCEALING ITS OWNERSHIP OF SHARES OF ITS OWN STOCK PREVIOUSLY ACQUIRED BY IT IN VIOLATION OF LAW.

The Circuit Court of Appeals followed the well-established decisions of this Honorable Court and of Federal courts of inferior jurisdiction when it reversed that part of the decree of the District Court which adjudged the de-

fendant Greaney liable on his note. In this respect the District Court made the following basic finding:

> "Early in 1930, the Boston found itself in a position where it was the owner of 190 shares of its own stock. This ownership came about by the purchase of the stock from one of its directors who threatened to dump it on the open market. Fearing the result of such action, the bank took the stock over, and carried it as a cash item. Such ownership was in violation of the National Banking Act. 12 U.S.C.A. Sec. 83. In order to conceal this illegal ownership, a scheme was devised whereby the note of some third person would be carried on the bank's books as a receivable, and the stock would be carried on the records either in the name of that third person, or in someone's name other than the bank" (R. 13).

This finding clearly establishes that the acts of the parties in giving the promissory note and in registering the stock in the name of persons other than the bank were entirely fictitious and of no legal effect. The net result of these transactions was as if the shares of stock had never been transferred out of the bank's name.

All the cases bearing upon the liability of the maker of a promissory note given to a national bank for its accommodation, and to enable it to conceal from the bank examiner its true financial condition, establish the following propositions:

(1) The maker may set up lack of consideration as a defense;

(2) Participation by the maker in such an illegal transaction does not aid the bank's receiver, but precludes recovery by him;

(3) The receiver of the bank is in no better position than the bank itself would have been.

In *Rankin, Receiver*, v. *City National Bank*, 208 U.S. 541, this Honorable Court rendered a decision involving the principles under discussion in the case at bar. In that case the president of a bank arranged with the defendant bank (called the City Bank) to discount his individual note and deposit the proceeds to a special account in the name of his bank (called the Guthrie Bank) under an arrangement whereby these funds were not to be drawn against but were to remain with the City Bank until the note was paid. The purpose of this transaction was to effect a reduction of certain loans to which the examiner had objected as excessive. The president gave his bank a check on the City Bank, the amount of which was credited to his personal account, and on the same day he gave his bank a check on his personal account, which was credited to bills receivable, and the objectionable notes were taken out of the bank's assets. The receiver of the Guthrie Bank sued to recover the deposit to its credit which the City Bank had offset against the note held by it on the day that the Guthrie Bank closed. It was agreed by the parties that the transaction between the banks was not illegal, but in affirming a decision in favor of the defendant bank, the court enunciated certain well-defined principles in the following language:

> (P. 545) " * * * the whole business from beginning to end, was and was intended to be a mere juggle with books and paper to deceive the bank examiner. The City Bank never received anything from the Guthrie Bank, the Guthrie Bank never parted with anything to the City Bank, or with anything for the loss of which the City Bank is responsible, if it parted with anything at all."
>
> (P. 546) "As between the banks no one got any money, and the only benefit of the loan in fact or contemplation was a swindle upon the bank examiner * * *.

If the Guthrie Bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank * * *."

(P. 547) "In view of the statement of counsel, at the argument * * * that they did not contend that the contract was illegal * * * and in view of the possibility that the facts were found as they were with that agreement in view, we shall not consider that aspect of the case. *It would not help the plaintiff. McMullen* v. *Hoffman,* 174 U.S. 639." (Italics ours.)

The decision in the Rankin case has quite recently been approved and reaffirmed by this Honorable Court in *Deitrick, Receiver,* v. *Standard Surety & Casualty Co.,* 303 U.S. 471, in which case the issues were identical with those in the case at bar. Actions were brought by the receiver of a closed bank on surety bonds given to the bank to secure the payment of certain discounted notes and the surety company brought a bill in equity to cancel the bonds because of fraud. The surety company set up that the bonds had been obtained from its agent on the representation by the bank that it would not hold the surety company liable and merely wanted to be able to show the bond in case the examiner should ask for collateral.

Decisions in favor of the surety company in the District Court were affirmed by the Circuit Court of Appeals, which approved without reservation the same contentions advanced by the defendant herein, that the plaintiff as receiver is in no better position than the bank and indeed is precluded from recovery by its participation in the illegal transaction.

The Circuit Court in its opinion, found in 90 F. (2d) 862, said:

(P. 865) "It is clear from the pleadings that the receiver seeks to recover on these bonds as assets of the

bank. In such an action he stands no better than the bank itself. All defenses open against the bank in such a case are open against the receiver, and he is chargeable with knowledge of all the facts known to the bank affecting the character of the claim. While there are decisions in the state courts to the contrary, the federal courts sustain this position [citing many cases, including *Cutler* v. *Fry*, 240 F. 238; *Yates Center National Bank* v. *Schaede*, 240 F. 240; aff'd 240 F. 241; *Bank* v. *Lauber*, 240 F. 237; *Rankin* v. *City Nat. Bank*, 208 U.S. 541].

"If therefore the contract with the surety company was illegal as to the bank * * * a recovery could not be had by the receiver."

This Honorable Court in affirming the decision of the Circuit Court of Appeals discussed the Rankin case and with reference thereto said:

(P. 480) "We adhere to the doctrine there approved and regard it as decisive of the present cause."

In *Yates Center National Bank* v. *Lauber*, 240 F. 237, pursuant to an arrangement to help the officers conceal the financial condition of the bank, the bank turned over certain worthless notes to the defendant for his note, and agreed that it would at any time accept them in satisfaction of his note. The court refused to hold the defendant liable, saying:

(P. 238) "* * * the illegality of the entire matter so clearly appears as to prevent a court of justice from affording any relief based thereon."

In *Cutler* v. *Fry*, 240 F. 238, the defendant was induced to give his note in exchange for the president's note, to

help conceal defalcations of the president, under an agreement that the bank would at any time take the president's note in payment of the defendant's note. The court held that lack of consideration was a defense, and said:

> (P. 239) "However, the rights of the receiver of the bank to recover on the note in question rise no higher than the rights of the bank had insolvency not intervened * * * in the hands of the original payee or its receiver, as is this case, both the note and the contemporaneous agreement constituted the entire contract between the parties and, when the agreement thus formed is presented, the illegality of the whole matter so clearly appears the court will leave the parties where it finds them by refusing all relief. *Rankin* v. *City National Bank* 208 U.S. 541; *McMullen* v. *Hoffman* 174 U.S. 639."

In *Yates Center National Bank* v. *Schaede*, 240 F. 240 (affirmed without opinion by the Circuit Court of Appeals for the Eighth Circuit, 240 F. 241), the court refused to enforce a note given to a bank without consideration to conceal the defalcations of its president, saying:

> (P. 240) "Not only is this defense (want of consideration) made out but it further appears that the whole transaction from the making of the original note to the renewal in controversy, was without consideration and in pursuance of the illegal and criminal design of the president of the bank. Such state of facts public policy and good morals alike condemn, and courts refuse to enforce."

In *Andresen* v. *Kaercher*, 38 F. (2d) 462 (C.C.A. 8th), the bank had a claim against the estate of one Kaercher and entered into an agreement with the defendants whereby the

defendants deeded certain real estate to the bank (which was to be sold as soon as possible) and gave to the bank accommodation notes so that the bank might be able to show them as assets until the real estate should be sold. The trial court directed a verdict for the defendants, and this decision was affirmed on appeal, the court stating:

> (P. 464) "The receiver of an insolvent bank stands in no better position than the bank stood as a going concern. *Rankin* v. *City National Bank* 208 U.S. 541, *Petersen* v. *Tillinghast* 192 F. 287. • • • it cannot be contended that the Citizens National Bank while a going concern could have maintained actions against them to recover on the notes. *Cherry* v. *City National Bank* 144 F. 589, 591."

The court answered the argument that the defendants had been guilty of a concerted attempt to deceive the Comptroller of the Currency, in the following language:

> (P. 464) "But, be this as it may, the result is not affected because the court will not lend its assistance in any way towards carrying out an illegal contract, nor will it enforce any alleged rights directly springing from such a contract. *McMullen* v. *Hoffman*, 174 U.S. 639. In this view the bank itself could not have collected, nor is the receiver more advantageously situated • • •."

The foregoing authorities, it is submitted, establish that, where a note is given to a bank for its accommodation and to conceal its true financial condition from the Comptroller's office, the maker may set up the defense of lack of consideration as against the bank's receiver, and that, even at the instance of the receiver, the courts will not enforce a note given as part of such an illegal transaction. The bank's

unge into insolvency and receivership does not absolve of the taint of illegality, which persists to bar recovery by e receiver. His rights are in no way superior to the ghts of the bank, and, that being so, the time-honored rinciple denying enforcement of illegal obligations must tain.

II.

IN A SUIT ON AN ACCOMMODATION NOTE GIVEN TO A NATIONAL NK, AT ITS REQUEST, AND TAKEN BY THE BANK FOR THE PURPOSE CONCEALING ITS OWNERSHIP OF SHARES OF ITS OWN STOCK EVIOUSLY ACQUIRED BY IT IN VIOLATION OF LAW, LIABILITY OF IE MAKER CANNOT BE PREDICATED MERELY ON THE FACT THAT E WAS A DIRECTOR OF THE BANK.

As shown above, it is clear that the note transactions in estion were fictitious, without consideration, and constituted an illegal agreement, so that no recovery on the tes can be had by the bank or its receiver. The fact that e maker of the note in suit was a director of the bank nnot alter the situation. To be sure, he owes duties to e bank which another might not owe, but he is not being ed for dereliction of duty—he is being sued as the maker a note, and there is no principle or authority which would pply consideration when none existed, which would exculte the bank *in pari delicto* or which would give to the reiver rights superior to those enjoyed by the bank, merely cause he was a director.

Furthermore, the receiver here is suing to recover on the te as an asset of the bank. In such a suit the receiver nnot recover on account of any rights derived through editors of the bank and arising out of damage to them. he pleadings do not allege deception of or any damage creditors and depositors, nor, in fact, is there any allegaon that the bank examiner was deceived. Precisely the

same question was in issue in the case of *Deitrick, Receiver, v. Standard Surety & Casualty Co.*, discussed in detail above, where the court said:

> (P. 480) "An examination of the pleadings makes it quite clear that the Receiver undertook to set up rights acquired by the insolvent bank through duly executed contracts between it and the Surety Company. He makes no suggestion of a purpose attributable to the company to mislead creditors or others; makes no allegations of damage except that sustained by the bank. He sets up no facts which would render unconscionable a denial of liability upon the bond because of the agent's fraud, obviously induced by the president of the bank. In this state of the pleadings the Receiver may not have judgment; he cannot rely on something not complained of, nor can he have damages because of supposed deceptions which the pleadings fail to suggest."

It is submitted that the decision of the Circuit Court of Appeals denying recovery on the note was in complete accord with the well-established decisions of this Honorable Court, and that the District Court, in addition to departing from the decisions of this Honorable Court, erred in enforcing a right not asserted and not litigated.

III.

THE PETITIONER SHOWS NO CAUSE FOR THE GRANTING OF HIS APPLICATION FOR A WRIT OF CERTIORARI.

The petitioner urges that a writ of certiorari should issue because the decision of the Circuit Court of Appeals was contrary to applicable decisions of the Massachusetts Supreme Judicial Court and contrary to principles established by this Honorable Court. It has been shown above that the decision of the Circuit Court of Appeals with respect to

Greaney's liability on his note was in complete accord with well-established decisions of this Honorable Court. The respondent submits that there is no conflict with decisions of the Massachusetts courts and that the decisions of the Massachusetts courts are not applicable to the issue in this case.

The Massachusetts decisions on which the petitioner relies do not involve suits by or in behalf of *national* banks. Both of the Massachusetts cases cited by the petitioner are easily distinguishable from the case at bar, since in those cases the defendant in each instance gave his obligation to the bank in actual substitution for a real asset held by the bank, thereby affording a consideration. In the case at bar, Karnow in the first instance gave his note to the bank, not in substitution for an asset of the bank, but to aid the bank in concealing its continued illegal ownership of its own shares of stock. Under such circumstances, Karnow could not be held liable to the bank or its receiver, even under the Massachusetts decisions on which the plaintiff relies, since Karnow was not an officer or director of the bank. The evidence and findings (R. 14, 15) clearly establish that Greaney gave the note in suit in substitution for Karnow's note, and that there was an "agreement between the bank and Greaney to the effect that he was to stand in Karnow's shoes" (R. 15). Under such circumstances, it is clear that there was no consideration for Greaney's note—the bank gave up nothing except the illegal, unenforcible Karnow note,—certainly not an asset of the bank—and agreed that the Greaney note should be held on the same terms. There was no damage to the bank or its depositors, such as induced the Massachusetts court to impose liability in the cases relied upon by the plaintiff. Furthermore, neither of those decisions involves the enforcibility of an illegal agreement where both parties are *in pari delicto*. The Massachusetts decision principally relied upon by the petitioner

discusses only the question of consideration and fraudulent inducement, although it is true that with reference to the latter question the court uses loosely the word "invalidity." There could have been no question of illegality of the transactions involved in the Massachusetts decisions since the Massachusetts statutes regulating banks, unlike the Federal statutes, contain no provisions imposing a penalty on transactions intended to deceive a bank examiner. For that reason illegality was not pleaded as a defense in the Massachusetts cases and they do not serve as authority upon which the Federal court might rely.

In any event it is submitted that decisions of the Massachusetts courts do not govern the validity of the note in question. The petitioner relies on the case of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, to support his contention that Massachusetts law governs this question. In that case the court says:

> (P. 78) "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state."

It is submitted that the case at bar comes within the foregoing exception as a case arising under the Acts of Congress. An action by or against a receiver of a national bank, appointed under the Banking Act, is an action arising under the laws of the United States because an Act of Congress creates his office, grants his rights and powers and imposes his duties. In the absence of this Act there would be no such receiver and no suits by or against him could arise. Every action by or against him necessarily involves the exercise of some of his rights, or the proper discharge of some of his duties, and invokes a consideration of the proper construction and effect of the laws of the United States from which he derives them. *Auten* v. *U.S. National Bank*, 174 U.S. 125.

The basic question in the case at bar is whether or not the note in suit is such an asset of a national bank as will entitle its receiver to maintain a suit thereon. Certainly such a question should be uniformly decided so that the right of a national bank or its receiver to enforce such a note should not vary according to the law of each State. This Honorable Court would not countenance such a probable lack of uniformity in the determination of the liability of a shareholder in a national bank for an assessment. The dangers of allowing such matters to be subject to the rules established by different State courts can be further illustrated in the problems of set-off which arise continually in the liquidation of insolvent national banks—certainly Federal courts should not be expected to follow a State court if it should decide that a debtor of an insolvent bank might obtain the benefits of a set-off by acquiring the claim of a depositor after the closing of a bank.

The decision in *Deitrick, Receiver,* v. *Standard Surety & Casualty Co.* (*supra*) may be used as authority for the proposition that the validity and enforcibility of an obligation deemed to be an asset of a closed national bank is not governed by State law but comes within the above-quoted exception to the general rule established by *Erie Railroad Co.* v. *Tompkins* (*supra*). The Tompkins case was argued on January 31, 1938, and decided on April 25, 1938. The Deitrick case was argued on March 7 and 8, 1938, and decided on March 28, 1938, at a time when this Court had the Tompkins case under consideration. After the decision in the Tompkins case, this Honorable Court, on May 2, 1938, denied a petition for a rehearing of the Deitrick case. It should be noted that the decision in the Deitrick case follows and reaffirms the rule of law established in the Rankin case discussed at length above, and that neither case purports to follow the rules of decision of any but the Federal courts.

The validity of the note in question arises under the Acts of Congress, since it was given to conceal the continued ownership by the bank of its own shares of stock held in violation of section 5201 of Rev. Stat. of 1873 (U.S.C. Title 12, sec. 83). On page 12 of the plaintiff's petition for a writ of certiorari the following argument is found: "As indicated herein above, the question presented by this case is one of great importance with respect to the stability and proper management of the institutions which make up our public banking system." Such a contention on the part of the petitioner, joined in by the Comptroller of the Currency, although not a reason for holding such a note enforcible, clearly exhibits that the question in issue is one that should be uniformly decided by the Federal courts and not subject to the vagaries of State court decisions.

Conclusion.

The decree of the Circuit Court of Appeals denying the right to enforce the note in suit was in complete accord with the decisions of this Honorable Court. Massachusetts law does not govern the question in issue and the decision of the Circuit Court of Appeals is not in conflict with any decisions of the Massachusetts courts. Accordingly the petitioner has shown no grounds for the granting of his application for a writ of certiorari.

Wherefore your respondent respectfully submits that the plaintiff's application for a writ of certiorari should be denied.

THOMAS E. GREANEY, *Respondent,*
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Supreme Court of the United States.

OCTOBER TERM, 1939.

No. 246.

FREDERICK S. DEITRICK,
RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK,
Petitioner,
v.
THOMAS E. GREANEY,
Respondent.

BRIEF FOR THE RESPONDENT.

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FREDERICK S. DEITRICK,
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v.
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Respondent.

BRIEF FOR THE RESPONDENT.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court was rendered on June 16, 1938 (R. 13-17), and is reported in 23 F. Supp. 758. The opinion of the Circuit Court of Appeals was rendered on March 25, 1939 (R. 77-90), and is reported in 103 F. (2d) 83.

STATEMENT OF THE CASE.

This is a suit in equity brought in the District Court of the United States for the District of Massachusetts by the receiver of an insolvent national bank to recover from the defendant Greaney and others the amount of a stock assessment levied by the Comptroller of the Currency upon shareholders of the Boston-Continental National Bank, and to recover from the defendant Greaney and another on a promissory note signed by the defendant Greaney.

The defendant Greaney, in his answer (R. 7-10), admitted the execution of the notes and transfers of stock described in the plaintiff's bill, but denied that he or Karnow ever became the owners of said stock, and alleged that said transactions were effected at the request of the bank and for its accommodation, that the bank at all times owned the stock, that it was never intended that any of the defendants should become the owners of said stock, and that the successive transfers to Greaney, Karnow and Mahoney were made to secure the maker of the accommodation note or notes held by the bank.

At the trial of the case in the District Court the following facts were found:

Early in 1930 the Boston National Bank, in violation of the National Banking Act, became the owner of 190 shares of its own capital stock. In order to conceal this fact, the bank, acting through one Ulin, its president, induced the defendant Karnow to execute and deliver to the bank for its accommodation his note in the sum of $23,500. Karnow's note was discounted, the proceeds turned over by Karnow to the defendant Greaney, who at that time was a director of the bank, and Greaney in turn paid the money over to the bank. The shares of stock were thereupon transferred upon the books of the bank to Greaney (R. 13, 14).

From time to time Karnow was induced to renew the note given by him to the bank, and shortly after the first renewal he had the stock standing in Greaney's name transferred on the bank's records from Greaney's name to his own and took actual possession of the certificates (R. 14).

In December of 1930 the Boston National Bank was consolidated with the Continental National Bank under the name Boston-Continental National Bank, and the 190 shares of Boston National Bank stock standing in the name of Karnow became convertible into 684 shares of stock of

the consolidated bank, with a par value of twenty dollars ($20) per share, and were so converted. Prior to the consolidation and conversion of the stock, the Boston National Bank had agreed to sell the 190 shares of its own stock held by Karnow to two officers of the Continental National Bank, named Ragan and Balter, at one hundred fifty dollars ($150) a share, and took a series of notes from the purchasers in payment. Three of the notes, totalling twenty-four thousand dollars ($24,000), were delivered to Greaney with instructions to obtain from Karnow shares of stock as paid for by the payment of said notes (R. 14).

In March of 1931 the first Ragan and Balter note, in the amount of nine thousand five hundred dollars ($9500), was paid. Pursuant to the aforesaid instructions, Karnow released 222.8 shares of stock of the consolidated bank for delivery and transfer to the purchasers, and Karnow was credited on the bank's books with the payment of nine thousand five hundred dollars ($9500) on account of his note (R. 14, 15).

In the early part of May, 1931, at the insistence of Karnow, the consolidated bank agreed to deliver up Karnow's note, at the same time inducing the defendant Greaney to substitute his note to the bank in the sum of fourteen thousand five hundred fifty-three dollars and sixty-six cents ($14,553.66), which at that time represented the then unpaid balance of the Karnow note appearing on the bank's books. At or about the same time the stock held by Karnow was surrendered and put in the name of the defendant Mahoney without his knowledge or consent (R. 15).

In December of 1931 the consolidated bank was closed and a receiver appointed, and on July 11, 1932, an assessment was made by the Comptroller against all stockholders of said bank equal to the par value of their stock, but the assessment upon the 457.2 shares standing in the name of Mahoney was never paid (R. 15).

On June 16, 1938, the court filed an opinion (R. 13-17) wherein certain findings of fact and rulings were made pursuant to which a final decree was entered on June 30, 1938 (R. 12), dismissing the bill as against the defendants Karnow and Mahoney, adjudging the defendant Greaney liable upon a stock assessment in the amount of $9144 with interest as the owner of 457.2 shares of stock standing in the name of the defendant Mahoney, and adjudging him liable to the plaintiff in the sum of $14,553.66, the amount of the promissory note held by the bank, together with interest.

Thereafter, on September 28, 1938, the defendant Greaney appealed to the Circuit Court of Appeals for the First Circuit from the final decree entered on June 30, 1938 (R. 17).

After argument and hearing, the Circuit Court of Appeals on March 25, 1939, rendered an opinion (R. 77-90), and on the same day entered a decree (R. 90) in which it reversed the decree of the District Court in so far as it held the defendant Greaney liable on his note for fourteen thousand five hundred fifty-three dollars and sixty-six cents ($14,553.66), ordered the suit dismissed as to such liability, and affirmed the decree of the District Court in so far as it established the defendant Greaney's liability in the amount of nine thousand one hundred forty-four dollars ($9144), together with interest, as an assessment on 457.2 shares of stock of the Boston-Continental National Bank (R. 90-91).

Thereafter the plaintiff, seeking a review of the decree of the Circuit Court of Appeals, filed a petition for a writ of certiorari with this Honorable Court. The defendant Greaney filed a cross-petition for a writ of certiorari, being docket No. 247, seeking a review of that part of the decree of the Circuit Court of Appeals which adjudged him liable for a stock assessment. This court, on October 9, 1939, granted the plaintiff's petition for a writ of certiorari (R. 93).

Summary of Argument.

It is submitted that the evidence and the express findings of fact of the District Court disclose that the giving of the note and the bank's apparent relinquishment of the stock constituted only a colorable transaction, and were merely part of a scheme to conceal from the bank examiner the bank's illegal ownership of the stock. The undisputed testimony at the trial of the cause and the findings of the District Court establish that the bank never actually parted with its beneficial ownership of the shares of stock, and that none of the parties intended that the promissory note be considered an actual obligation.

It is respectfully submitted that the portion of the opinion of the Circuit Court of Appeals (R. 77-84) which exempts Greaney from liability on his promissory note is in complete accord with the principles set forth in established decisions to the effect that the receiver of a closed national bank may not recover from the maker of an illegal accommodation note given to the bank at its request and taken by the bank for the purpose of concealing its ownership of shares of its own stock previously acquired by it in violation of the National Banking Act.

In the plaintiff's attempt to hold Greaney liable on his note, great weight is placed upon the fact that Greaney was a director in the bank of which the plaintiff is the receiver. Such argument by the plaintiff might be sound if this were a suit by a receiver of a close national bank on behalf of its creditors to impose liability on a director for a breach of duty to depositors, but the pleadings do not state such a case. This is merely a suit by a receiver to recover on a note as an asset of the bank. In such a proceeding the fact that the maker of the note was also a director of the payee cannot deprive the maker of his agreement with the payee that the note would not be enforced against him. The defendant is not estopped to assert such

a defense since all the requisites of an estoppel are lacking in the instant case. Particular attention should be directed to the fact that the bill in equity does not allege, nor is there any evidence or finding, that the giving of the note in suit in any way damaged the bank or its depositors or deceived the bank examiner. The evidence and findings in the case clearly establish that the bank acquired the shares of stock in question considerably before the defendant gave the note in question. The bank gave up nothing and acquired nothing when it took the note in suit. The findings of the District Court clearly show that this note was taken, not to divest the bank of its ownership of the stock, but to conceal its continued ownership. *The giving of the note under such circumstances did not increase or decrease the assets of the bank—the allowance of a recovery on the note would result in a windfall to the bank.*

Despite the contentions of the petitioner, it is clear that the validity and enforcibility of the note in suit is to be governed by Federal court rules of decisions and not by Massachusetts law. Furthermore, the decision of the Circuit Court of Appeals does not conflict with decisions of the Massachusetts courts.

Argument.

I.

THE RECEIVER OF A CLOSED NATIONAL BANK MAY NOT RECOVER FROM THE MAKER OF AN ACCOMMODATION NOTE GIVEN TO THE BANK, AT ITS REQUEST, AND TAKEN BY THE BANK FOR THE PURPOSE OF CONCEALING ITS OWNERSHIP OF SHARES OF ITS OWN STOCK PREVIOUSLY ACQUIRED BY IT IN VIOLATION OF LAW.

The Circuit Court of Appeals followed the well-established decisions of this Honorable Court and of Federal courts of inferior jurisdiction when it reversed that part of the decree of the District Court which adjudged the de-

fendant Greaney liable on his note. In this respect the District Court made the following basic finding:

> "Early in 1930, the Boston found itself in a position where it was the owner of 190 shares of its own stock. This ownership came about by the purchase of the stock from one of its directors who threatened to dump it on the open market. Fearing the result of such action, the bank took the stock over, and carried it as a cash item. Such ownership was in violation of the National Banking Act. 12 U.S.C.A. Sec. 83. In order to conceal this illegal ownership, a scheme was devised whereby the note of some third person would be carried on the bank's books as a receivable, and the stock would be carried on the records either in the name of that third person, or in someone's name other than the bank" (R. 13).

This finding clearly establishes that the acts of the parties in giving the promissory note and in registering the stock in the name of persons other than the bank were entirely fictitious and of no legal effect. The net result of these transactions was as if the shares of stock had never been transferred out of the bank's name.

All the cases bearing upon the liability of the maker of a promissory note given to a national bank for its accommodation, and to enable it to conceal from the bank examiner its true financial condition, establish the following propositions:

(1) The maker may set up lack of consideration as a defense;

(2) Participation by the maker in such an illegal transaction does not aid the bank's receiver, but precludes recovery by him;

(3) The receiver of the bank is in no better position than the bank itself would have been.

In *Rankin, Receiver*, v. *City National Bank*, 208 U.S. 541, this Honorable Court rendered a decision involving the principles under discussion in the case at bar. In that case the president of a bank arranged with the defendant bank (called the City Bank) to discount his individual note and deposit the proceeds to a special account in the name of his bank (called the Guthrie Bank) under an arrangement whereby these funds were not to be drawn against but were to remain with the City Bank until the note was paid. The purpose of this transaction was to effect a reduction of certain loans to which the examiner had objected as excessive. The president gave his bank a check on the City Bank, the amount of which was credited to his personal account, and on the same day he gave his bank a check on his personal account, which was credited to bills receivable, and the objectionable notes were taken out of the bank's assets. The receiver of the Guthrie Bank sued to recover the deposit to its credit which the City Bank had offset against the note held by it on the day that the Guthrie Bank closed. It was agreed by the parties that the transaction between the banks was not illegal, but in affirming a decision in favor of the defendant bank, the court enunciated certain well-defined principles in the following language:

(P. 545) "* * * the whole business from beginning to end, was and was intended to be a mere juggle with books and paper to deceive the bank examiner. The City Bank never received anything from the Guthrie Bank, the Guthrie Bank never parted with anything to the City Bank, or with anything for the loss of which the City Bank is responsible, if it parted with anything at all."

(P. 546) "As between the banks no one got any money, and the only benefit of the loan in fact or contemplation was a swindle upon the bank examiner * * *.

If the Guthrie Bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank * * *."

(P. 547) "In view of the statement of counsel, at the argument * * * that they did not contend that the contract was illegal * * * and in view of the possibility that the facts were found as they were with that agreement in view, we shall not consider that aspect of the case. *It would not help the plaintiff. McMullen* v. *Hoffman*, 174 U.S. 639." (Italics ours.)

The decision in the *Rankin* case has quite recently been approved and reaffirmed by this Honorable Court in *Deitrick, Receiver,* v. *Standard Surety & Casualty Co.*, 303 U.S. 471, in which case the issues were identical with those in the case at bar. Actions were brought by the receiver of a closed bank on surety bonds given to the bank to secure the payment of certain discounted notes and the surety company brought a bill in equity to cancel the bonds. The surety company set up that the bonds had been obtained from its agent on the representation by the bank that it would not hold the surety company liable and merely wanted to be able to show the bond in case the examiner should ask for collateral.

Decisions in favor of the surety company in the District Court were affirmed by the Circuit Court of Appeals, which approved without reservation the same contentions advanced by the defendant herein, that the plaintiff as receiver is in no better position than the bank and indeed is precluded from recovery by its participation in the illegal transaction.

The Circuit Court in its opinion, found in 90 F. (2d) 862, said:

(P. 865) "It is clear from the pleadings that the receiver seeks to recover on these bonds as assets of the bank. In such an action he stands no better than the

bank itself. All defenses open against the bank in such a case are open against the receiver, and he is chargeable with knowledge of all the facts known to the bank affecting the character of the claim. While there are decisions in the state courts to the contrary, the federal courts sustain this position [citing many cases, including *Cutler* v. *Fry*, 240 F. 238; *Yates Center National Bank* v. *Schaede*, 240 F. 240; aff'd 240 F. 241; *Bank* v. *Lauber*, 240 F. 237; *Rankin* v. *City Nat. Bank*, 208 U.S. 541].

"If therefore the contract with the surety company was illegal as to the bank * * * a recovery could not be had by the receiver."

This Honorable Court in affirming the decision of the Circuit Court of Appeals discussed the *Rankin* case and with reference thereto said:

(P. 480) "We adhere to the doctrine there approved and regard it as decisive of the present cause."

In *Yates Center National Bank* v. *Lauber*, 240 F. 237, pursuant to an arrangement to help the officers conceal the financial condition of the bank, the bank turned over certain worthless notes to the defendant for his note, and agreed that it would at any time accept them in satisfaction of his note. The court refused to hold the defendant liable, saying:

(P. 238) "* * * the illegality of the entire matter so clearly appears as to prevent a court of justice from affording any relief based thereon."

In *Cutler* v. *Fry*, 240 F. 238, the defendant was induced to give his note in exchange for the president's note, to

help conceal defalcations of the president, under an agreement that the bank would at any time take the president's note in payment of the defendant's note. The court held that lack of consideration was a defense, and said:

> (P. 239) "However, the rights of the receiver of the bank to recover on the note in question rise no higher than the rights of the bank had insolvency not intervened * * * in the hands of the original payee or its receiver, as is this case, both the note and the contemporaneous agreement constituted the entire contract between the parties and, when the agreement thus formed is presented, the illegality of the whole matter so clearly appears the court will leave the parties where it finds them by refusing all relief. *Rankin* v. *City National Bank* 208 U.S. 541; *McMullen* v. *Hoffman* 174 U.S. 639."

In *Yates Center National Bank* v. *Schaede*, 240 F. 240 (affirmed without opinion by the Circuit Court of Appeals for the Eighth Circuit, 240 F. 241), the court refused to enforce a note given to a bank without consideration to conceal the defalcations of its president, saying:

> (P. 240) "Not only is this defense (want of consideration) made out but it further appears that the whole transaction from the making of the original note to the renewal in controversy, was without consideration and in pursuance of the illegal and criminal design of the president of the bank. Such state of facts public policy and good morals alike condemn, and courts refuse to enforce."

In *Andresen* v. *Kaercher*, 38 F. (2d) 462 (C.C.A. 8th), the bank had a claim against the estate of one Kaercher and entered into an agreement with the defendants whereby the

defendants deeded certain real estate to the bank (which was to be sold as soon as possible) and gave to the bank accommodation notes so that the bank might be able to show them as assets until the real estate should be sold. The trial court directed a verdict for the defendants, and this decision was affirmed on appeal, the court stating:

> (P. 464) "The receiver of an insolvent bank stands in no better position than the bank stood as a going concern. *Rankin* v. *City National Bank* 208 U.S. 541, *Petersen* v. *Tillinghast* 192 F. 287. * * * it cannot be contended that the Citizens National Bank while a going concern could have maintained actions against them to recover on the notes. *Cherry* v. *City National Bank* 144 F. 589, 591."

The court answered the argument that the defendants had been guilty of a concerted attempt to deceive the Comptroller of the Currency, in the following language:

> (P. 464) "But, be this as it may, the result is not affected because the court will not lend its assistance in any way towards carrying out an illegal contract, nor will it enforce any alleged rights directly springing from such a contract. *McMullen* v. *Hoffman*, 174 U.S. 639. In this view the bank itself could not have collected, nor is the receiver more advantageously situated * * *."

The foregoing authorities, it is submitted, establish that, where a note is given to a bank for its accommodation and to conceal its true financial condition from the Comptroller's office, the maker may set up the defense of lack of consideration as against the bank's receiver, and that, even at the instance of the receiver, the courts will not enforce a note given as part of such an illegal transaction. The bank's

plunge into insolvency and receivership does not absolve it of the taint of illegality, which persists to bar recovery by the receiver. His rights are in no way superior to the rights of the bank, and, that being so, the time-honored principle denying enforcement of illegal obligations must obtain.

II.

IN A SUIT ON AN ACCOMMODATION NOTE GIVEN TO A NATIONAL BANK, AT ITS REQUEST, AND TAKEN BY THE BANK FOR THE PURPOSE OF CONCEALING ITS OWNERSHIP OF SHARES OF ITS OWN STOCK PREVIOUSLY ACQUIRED BY IT IN VIOLATION OF LAW, LIABILITY OF THE MAKER CANNOT BE PREDICATED MERELY ON THE FACT THAT HE WAS A DIRECTOR OF THE BANK.

As shown above, it is clear that the note transactions in question were fictitious, without consideration, and constituted an illegal agreement, so that no recovery on the notes can be had by the bank or its receiver. The fact that the maker of the note in suit was a director of the bank cannot alter the situation. To be sure, he owes duties to the bank which another might not owe, but he is not being sued for dereliction of duty—he is being sued as the maker of a note, and there is no principle or authority which would supply consideration when none existed, which would exculpate the bank *in pari delicto* or which would give to the receiver rights superior to those enjoyed by the bank, merely because he was a director.

Furthermore, the receiver here is suing to recover on the note as an asset of the bank. In such a suit the receiver cannot recover on account of any rights derived through creditors of the bank and arising out of damage to them. The pleadings do not allege deception of or any damage to creditors and depositors, nor, in fact, is there any allegation that the bank examiner was deceived. Precisely the

same question was in issue in the case of *Deitrick, Receiver, v. Standard Surety & Casualty Co.*, discussed in detail above, where the court said:

> (P. 480) "An examination of the pleadings makes it quite clear that the Receiver undertook to set up rights acquired by the insolvent bank through duly executed contracts between it and the Surety Company. He makes no suggestion of a purpose attributable to the company to mislead creditors or others; makes no allegations of damage except that sustained by the bank. He sets up no facts which would render unconscionable a denial of liability upon the bond because of the agent's fraud, obviously induced by the president of the bank. In this state of the pleadings the Receiver may not have judgment; he cannot rely on something not complained of, nor can he have damages because of supposed deceptions which the pleadings fail to suggest."

It is submitted that the decision of the Circuit Court of Appeals denying recovery on the note was in complete accord with the well-established decisions of this Honorable Court, and that the District Court, in addition to departing from the decisions of this Honorable Court, erred in enforcing a right not asserted and not litigated.

III.

FEDERAL LAW GOVERNS THE VALIDITY AND ENFORCIBILITY OF THE NOTE IN SUIT.

The defendant's liability on his note given to aid the bank in concealing its continued illegal ownership of shares of its own stock must be determined by Federal law. The validity of the note in question arises under the Acts of Congress, since it was given to conceal the continued own-

ership by the bank of its own shares of stock held in violation of section 5201 of Rev. Stat. of 1873 (U.S.C. Title 12, sec. 83). The petitioner relies on the case of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, to support his contention that Massachusetts law governs this question. In that case the court said:

> (P. 78) "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state."

It is submitted that the case at bar comes within the foregoing exception as a case arising under the Acts of Congress. An action by or against a receiver of a national bank, appointed under the Banking Act, is an action arising under the laws of the United States because an Act of Congress creates his office, grants his rights and powers and imposes his duties. In the absence of this Act there would be no such receiver and no suits by or against him could arise. Every action by or against him necessarily involves the exercise of some of his rights, or the proper discharge of some of his duties, and invokes a consideration of the proper construction and effect of the laws of the United States from which he derives them. *Anten* v. *U.S. National Bank*, 174 U.S. 125.

The basic question in the case at bar is whether or not the note in suit is such an asset of a national bank as will entitle its receiver to maintain a suit thereon. Certainly such a question should be uniformly decided so that the right of a national bank or its receiver to enforce such a note should not vary according to the law of each State.

In *Jennings, Receiver*, v. *U.S. Fidelity & Guaranty Co.*, 294 U.S. 216, this court had under consideration provisions of the Indiana code whereby an owner of negotiable paper given to a bank for collection, and collected but not paid over, became a preferred claimant. The court, in dealing

with the liquidation of an insolvent national bank, held that the local law was contrary to the system of equal distribution established by Federal law and therefore was not applicable to the liquidation of a national bank.

The decision in *Deitrick, Receiver*, v. *Standard Surety & Casualty Co.* (*supra*) may be used as authority for the proposition that the validity and enforcibility of an obligation deemed to be an asset of a closed national bank is not governed by State law but comes within the above-quoted exception to the general rule established by *Erie Railroad Co.* v. *Tompkins* (*supra*). The *Tompkins* case was argued on January 31, 1938, and decided on April 25, 1938. The *Deitrick* case was argued on March 7 and 8, 1938, and decided on March 28, 1938, at a time when this court had the *Tompkins* case under consideration. After the decision in the *Tompkins* case, this Honorable Court, on May 2, 1938, denied a petition for a rehearing of the *Deitrick* case. It should be noted that the decision in the *Deitrick* case follows and reaffirms the rule of law established in the *Rankin* case discussed at length above, and that neither case purports to follow the rules of decision of any but the Federal courts.

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN COMPLETE ACCORD WITH THE DECISIONS OF THE MASSACHUSETTS COURTS.

Even if it be assumed that the questions of law raised in the case at bar are to be governed by Massachusetts decisions rather than by the decisions of the Federal courts, it is submitted that the decision of the Circuit Court of Appeals denying recovery against Greaney on the note in question is in complete accord with well-established decisions of the Massachusetts Supreme Judicial Court.

There can be no doubt that the note in suit was given only in substitution for the unenforcible Karnow note formerly held by the bank, that both notes were given for the accommodation of the bank, not in substitution for an asset of the bank, and for the sole purpose of concealing the bank's continued illegal ownership of its own shares of stock. The Massachusetts court has uniformly held that a promissory note made for the accommodation of a bank is without consideration and unenforcible.

> *Salem Trust Co.* v. *Deery*, 289 Mass. 431.
> *Great Barrington Savings Bank* v. *Day*, 288 Mass. 181.

In addition to the circumstance that the notes in question were given for the accommodation of the bank, it is clear that they were tainted with illegality because of the purpose to deceive the bank examiner. The Massachusetts court will not entertain an action to enforce a note given as part of a transaction illegal at common law or by statute, even where the note is supported by consideration.

In the case of *Wolkovisky* v. *Rapaport*, 216 Mass. 48, the court held invalid an agreement based upon a collusive divorce, and said, at page 51:

> "The aid of a court of law or of equity cannot be invoked to enforce a claim the very statement of which discloses an illegal purpose as its foundation. The law leaves the parties to unlawful contracts where they have placed themselves."

In the case of *Bishop* v. *Palmer*, 146 Mass. 469, the plaintiff sued for the balance of the purchase price of a business sold to the defendant. As part of the consideration the plaintiff made an agreement in restraint of trade. The court held that the entire purchase and sale constituted

an illegal agreement at common law, and that, since the entire consideration was not severable, the plaintiff could not maintain the action. It is the law of Massachusetts that promissory notes given for liquor sold in violation of statute are unenforcible.

Brigham v. *Potter*, 14 Gray, 522.
Hubbell v. *Flint*, 13 Gray, 277.
Holden v. *Cosgrove*, 12 Gray, 216.

In the case at bar the third prayer of the bill of complaint as amended (R. 4) seeks to have the defendant Greaney and the defendant Karnow adjudged liable on the promissory note in suit. The District Court found that Karnow gave his note only for the accommodation of the bank and dismissed the bill of complaint as against him, from which the plaintiff has taken no appeal. The District Court further found that Greaney gave his note in substitution of the Karnow note with the express agreement that Greaney was to stand in the same position as Karnow (R. 15). It is the law of Massachusetts that a note given in renewal of or in substitution for an illegal or accommodation note is without consideration and unenforcible.

Kennedy v. *Welsh*, 196 Mass. 592.
Salem Trust Co. v. *Deery, supra.*

The plaintiff relies upon the cases of *Prudential Trust Co.* v. *Moore*, 245 Mass. 311, and *International Trust Co.* v. *Wattendorf*, 256 Mass. 323, as authority for establishing the liability of Greaney on the note in suit, but those cases are not in point. The circumstances in each of them are entirely different from those found in the case at bar.

In the *Prudential Trust Co.* case the court bases its decision on the fact that there was actual consideration for the note in suit since it was given in substitution for other

notes of a borrower which were valid and enforcible. In the *International Trust Co.* case the court likewise bases its decision upon the fact that the note in question was not an accommodation note and was supported by actual consideration. In both decisions the court bolsters its conclusions by a theory of estoppel, since in each case there was an actual change of position by the bank as a result of its taking the notes in suit. In the case at bar there can be no doubt that the note in suit was without consideration, was a note given for the accommodation of the bank, that the bank gave up no enforcible asset and in no way changed its position. There can be no estoppel under these circumstances.

In the case of *International Bankers of Massachusetts* v. *Reid, Murdoch & Co.*, 1937 Mass. Adv. Sh. 415, 8 N.E. (2d) 19, the court said, at page 419:

> "The essential factors giving rise to an estoppel are . . . (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made — (2) An act or omission resulting from the representation, whether actual or by conduct by the person to whom the representation is made (3) Detriment to such person as a consequence of the act or omission."

It is clear that the Massachusetts court in the *Prudential Trust Co.* case and in the *International Trust Co.* case, although it found consideration, also established liability by reason of an estoppel due to the change of position suffered by the bank in each instance when it relinquished an enforcible asset.

The decisions in those cases have since been distinguished by the most recent decision of the Massachusetts Supreme

Judicial Court. In the case of *Quincy Trust Co.* v. *Woodbury*, 1938 Mass. Adv. Sh. 475, 13 N.E. (2d) 377, the plaintiff bank induced the defendants to endorse a promissory note for its accommodation upon the representations that the defendants would never be called upon to pay the note and that the endorsements were sought in order that the bank examiner might not otherwise object to the note in question. The circumstances in that case are strikingly parallel to those in the case at bar. In both cases the obligations sought to be enforced were given for the accommodation of the bank without any consideration to the party sought to be charged and with the express agreement that the obligations would not be enforced; in both cases the obligations in question were given to conceal the true condition of the bank from a bank examiner; in neither case was there any detriment to the bank nor did the bank change its position financially or otherwise, and it does not appear that the creditors of either bank were injured or misled. The decision of the Massachusetts court in the *Quincy Trust Co.* case shows clearly that under these circumstances no liability exists in the absence of facts creating an estoppel.

In denying recovery to the plaintiff bank, the court held, at page 477:

> "The plaintiff contends, however, that the defendants cannot make this defence to the renewal note, because their endorsements of the original note were intended to give the plaintiff an apparent soundness, the reality of which the defendants cannot be permitted to deny or impair. It is true that circumstances somewhat like those in the present case might create an estoppel against such a defence. *Prudential Trust Co.* v. *Moore*, 245 Mass. 311, 316. *International Trust Co.* v. *Wattendorf*, 256 Mass. 323. *Schmid* v. *Haines*, 115 N.J.L. 271, 274. But the present record contains nothing to show an estoppel. It does not appear that the

impending visit of the bank examiners ever took place, much less that the notes in question had any actual effect upon the situation of creditors of the plaintiff."

The authority of the decision in *Quincy Trust Co.* v. *Woodbury, supra,* is not altered by the argument that it did not deal with a suit by a receiver of a closed bank. The Massachusetts court follows the rule established by this Honorable Court in *Rankin, Receiver,* v. *City National Bank, supra,* to the effect that a receiver or the commissioner of banks in possession of a closed bank acquires no greater rights than the bank itself had.

In the case of *Commissioner of Banks* v. *Weisberg,* 249 Mass. 357, the court says, at page 360:

> "The commissioner of banks has no other or greater rights in the premises than those of the bank which he is liquidating."

It is submitted that, even if this court should determine that Massachusetts law governs the case at bar, the defendant Greaney would not be liable on the note in suit, and that the decision of the Circuit Court of Appeals was not contrary to the decisions of the Massachusetts Supreme Judicial Court.

V.

Discussion of argument contained in petitioner's brief.

It is most important that this court recognize that the petitioner makes no contention that the bank rectified its position by disposing of its own stock illegally acquired. The first paragraph commencing on page 8 of the petitioner's brief discloses that the petitioner and the respondent agree that the purpose and effect of the Karnow and Greaney notes was to conceal the bank's continued owner-

ship of the shares of stock and not to remove the same from the bank's ownership.

The argument of the petitioner whereby he seeks to have this court depart from well-established principles, on the ground that the policy of the National Banking Act requires imposition of liability, is not founded on facts proved at the trial or found by the District Court—there is no evidence or finding that the bank examiner was deceived, or that any depositor of the bank was injured. Furthermore, Greaney cannot be held liable in this action because he may have subjected himself to a criminal liability or to being charged civilly by reason of a fiduciary duty he may have owed as a director of the bank.

It is interesting to note that the petitioner is in accord with the respondent's contention that the situation presented by the instant suit is to be "governed by" an Act of Congress, rather than by local law, so as to come within the exception to the general rule established in *Erie Railroad Co.* v. *Tompkins, supra.*

The petitioner is obviously troubled by the decision of this court in *Rankin* v. *City National Bank, supra,* and rightly so. That case was reaffirmed by the recent decision of this court in *Deitrick* v. *Standard Surety Company, supra.* The grounds of distinction argued by the petitioner are not convincing. The instant situation is not only controlled by the broader basis of the decision in the *Deitrick* case, but an examination of the pleadings in the case at bar will reveal the same defects that contributed to the decision of this court in the *Deitrick* case.

In section (C) of division II of his brief the petitioner cites cases holding that in some instances a receiver of an insolvent national bank may have rights superior to those of the bank. Such decisions do not involve situations where the receiver, as in the case at bar, is merely attempting to reduce to judgment a note held by the bank. This court

does not consider those decisions to be in conflict with the decision in the *Rankin* case, since it reaffirms the *Rankin* case in the *Deitrick* case, decided subsequently to the decisions relied on by the petitioner. The petitioner is unable to cite any decision of this court wherein a receiver, in suing to enforce an illegal executory agreement or note, has been given rights superior to those of the bank.

The authority of the cases cited by the respondent is in no way diminished by the fact that the respondent was a director of the bank. Although the petitioner's brief contains decisions in which some courts seem to impose liability because a defendant was a director, all of those cases are easily distinguishable. In each case cited by the petitioner there was real consideration—such as a note given in substitution for an asset of the bank—or all the elements of a real estoppel were found. The petitioner relies upon the decisions in *Lyons* v. *Westwater* (C.C.A. 3d, 1910), 181 Fed. 681, and (1912) 193 Fed. 817. The authority of those cases has been limited to enforcing liability to complete a contract of subscription—*Salter* v. *Williams*, 240 Fed. 130 (C.C.A. 3d)—and imposing liability upon the maker of an accommodation note given to replace an asset of the bank—*Federal Reserve Bank of Richmond* v. *Crothers*, 289 Fed. 777 (C.C.A. 4th). The respondent is confident that this court will not adopt the spurious reasoning of those decisions, which substitute for consideration an estoppel alleged to be required by public policy. If public policy in such cases means that the national banking structure would be weakened by refusing to allow the receiver of a closed national bank to recover on an illegal accommodation note, not given in substitution for an asset of the bank, the enforcibility of such a note should not depend on the maker being a director of the payee bank.

It is submitted that public policy will close our courts to a party *in pari delicto* seeking to enforce an illegal agree-

ment, but that it does not operate to deprive a party of the benefit of his agreement with respect to the enforcibility of his obligation. The integrity of the national banking structure is fully protected by section 5209 of Revised Statutes of 1873 as amended (U.S.C. Title 12, sec. 592), imposing a criminal liability on any person who aids in deceiving a bank examiner, and by the civil responsibility of a person causing damage by deception. If the petitioner has misconceived his remedy against Greaney, the aid of this court should not be invoked to correct such a mistake on a tenuous plea of public policy.

Conclusion.

The decree of the Circuit Court of Appeals denying the petitioner the right to enforce a note in suit was in complete accord with the decisions of this Honorable Court. Although Massachusetts law does not govern the question in issue, the decision of a Circuit Court of Appeals does not conflict with any decisions of the Massachusetts courts.

Wherefore the respondent respectfully requests that the decision of the Circuit Court of Appeals be affirmed.

THOMAS E. GREANEY, Respondent,
By his Attorney,
Thomas H. Mahony.

Of Counsel:
David Stoneman,
Harold Singer,
S. Sidney Stoneman,
Emmanuel Kurland.

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Supreme Court of the United States.

OCTOBER TERM, 1939.

No. 246.

FREDERICK S. DEITRICK,
RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK,
v.
THOMAS E. GREANEY.

PETITION OF THOMAS E. GREANEY FOR REHEARING.

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31 Milk Street,
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Of Counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Supreme Court of the United States.

OCTOBER TERM, 1939.

No. 246.

FREDERICK S. DEITRICK,
RECEIVER OF THE BOSTON-CONTINENTAL NATIONAL BANK,

v.

THOMAS E. GREANEY.

PETITION FOR REHEARING.

To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices thereof:

Your petitioner, Thomas E. Greaney, respectfully represents that on February 12, 1940, this Honorable Court, by a majority decision of the Justices thereof, reversed a decree of the United States Circuit Court of Appeals for the First Circuit after having granted certiorari therefor on October 9, 1939; that your petitioner desires that this Honorable Court grant a rehearing of said cause and reconsider its said decision of February 12, 1940, for the following reason:

The Record in the case at bar discloses that more than a year before the Receiver commenced the within suit he had full knowledge of all the facts and circumstances leading to the giving of the note in question by your petitioner. This appears in the plaintiff's exhibit 38 found on page 71 of the Record. Notwithstanding such knowledge, the Receiver deliberately stated in his bill of complaint (R. 2) that his claim

was based upon a note made by your petitioner for stock purchased by him from the bank. From the Record it is clear that the allegations contained in the plaintiff's bill of complaint (R. 2) state only a case whereby the Receiver seeks to recover on a promissory note based on a valuable consideration. The defendant's answer (R. 7) sets forth that the note was given as an accommodation for the bank without consideration, and the trial court so found.

Nowhere in the Record is there any suggestion, express or implied, that the rights of any creditors or depositors of the bank are involved, and the Receiver in his bill of complaint (R. 2) makes no claim that he is asserting rights derived from any one other than the bank.

It is respectfully submitted that this Honorable Court decided the instant case on issues not before it and on allegations not disclosed by the Record. It is the duty of this Honorable Court to render a decision in accordance with the Record brought to this Court.

See *Chapman & Dewey Lumber Co.* v. *Board of Directors of St. Francis Levee District*, 234 U.S. 667.

WHEREFORE your petitioner prays:

1. That this Honorable Court enlarge the time for issue of mandate until disposition of the within petition.

2. That this Honorable Court grant the within petition for rehearing and for such other and further relief in the premises as to this Honorable Court may seem meet and just.

THOMAS E. GREANEY, PETITIONER,
By his Attorney,
DAVID STONEMAN.

SINGER, STONEMAN & KURLAND,
Of Counsel.

I, David Stoneman, counsel for Thomas E. Greaney, hereby certify that the within petition for rehearing is presented in good faith and not for delay.

DAVID STONEMAN.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. MARCH 2, 1940.

Personally appeared DAVID STONEMAN and made oath to the truth of the foregoing certificate; before me,

S. SIDNEY STONEMAN,
Notary Public.

pp. 2 to 8.
Dissent p. 4

SUPREME COURT OF THE UNITED STATES.

No. 246.—October Term, 1939.

Frederick S. Deitrick, Receiver of the Boston-Continental National Bank, Petitioner,
vs.
Thomas E. Greaney.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[February 12, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

The question to be decided is whether a receiver of a national bank may compel payment of a promissory note knowingly given to the bank by one of its directors as a substitute, among its assets, for shares of its own stock illegally purchased and retained by the bank but with the understanding that it was to retain its interest in the stock and that the note was not to be paid.

Petitioner, receiver appointed by the Comptroller of the Currency for the Boston-Continental Bank, a national banking association, brought suit against respondent, a director of the bank, and others, in the District Court for Massachusetts to collect an assessment upon shares of stock in the insolvent bank and to recover on respondent's promissory note, found by the receiver among its assets.

The trial court found that the Boston National Bank, predecessor of the insolvent bank had acquired by purchase, 190 shares of its outstanding capital stock in violation of R. S. § 5201, 12 U. S. C. § 83, which declares that "no association shall . . . be the purchaser or holder of any such shares";[1] that respondent as a means of concealing the illegal acquisition of the stock and of enabling the

[1] "No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section fifty-two hundred and thirty-four [12 U. S. C. § 192]."

bank to retain its ownership of the stock, prevailed upon his co-defendant Karnow to execute an accommodation note, payable to the bank, the proceeds of which were deposited in another bank to the credit of respondent who then paid them to the Boston National Bank for the 190 shares of stock which were then transferred to the respondent on the books of the bank.

Following a renewal of the Karnow note respondent transferred the shares to him on the books of the bank and upon consolidation of the Boston with the Continental National Bank, to form the Boston-Continental National Bank of which petitioner later became receiver, new shares of the consolidated bank were issued in exchange for the old. Part of them were sold and the proceeds used in reduction of the Karnow note. Respondent then gave to the bank his own note for the balance, in substitution for Karnow's note and caused the remaining shares to be transferred to the name of O'Mahoney also a defendant in the suit, without informing him of the transfer.

The court found that the entire transaction was devised and carried out by respondent for the purpose of concealing the bank's ownership of the stock by ostensibly removing the shares of stock from its assets and carrying the successive notes in their stead as receivables on the books of the bank with a secret agreement that the stock should be held for the Boston and later for the Boston-Continental Bank without liability on the part of the maker of the note. The court found liability of respondent for the assessment upon the shares held by O'Mahoney for his account, concluded that he was estopped to deny liability on the note and decreed accordingly that respondent alone should pay the stock assessment and the amount due on the note, 23 Fed. Supp. 758.

The Court of Appeals for the First Circuit reversed so much of the decree as allowed recovery on the note. 103 F. (2d) 83. It confirmed the findings of the trial court. But it held that the circumstances which they detailed did not preclude the defense of want of consideration to the demand of the receiver, more than to that of the bank itself.

We granted certiorari, October 9, 1939, on petition of the receiver because of the public importance of the question in the administration of the National Banking Act and of the conflict of the decision below with that of the Court of Appeals for the Fourth Circuit, in

Federal Reserve Bank v. *Crothers*, 289 Fed. 777 and that of the Fifth Circuit in *Bohning* v. *Caldwell*, 10 F. (2d) 298.

The National Banking Act constitutes "by itself a complete system for the establishment and government of National Banks". *Cook County National Bank* v. *United States*, 107 U. S. 445, 448. In addition to the sections of the Act conferring on national banking associations the authority to conduct a public banking business the Act contains numerous provisions designed for the protection of the bank's depositors and other creditors. It establishes minimum requirements for the amount of capital with which a bank may begin business, R. S. § 5138, 12 U. S. C. § 51, and makes special provisions for securing the payment into the bank of the authorized capital, R. S. §§ 5140, 5141, 12 U. S. C. §§ 53, 54. It prohibits the purchase by a bank of its own shares of stock and their retention when purchased, R. S. § 5201, 12 U. S. C. § 83. Impairment of capital of an association through its withdrawal by payment of dividends or otherwise is prohibited, R. S. § 5204, 12 U. S. C. § 56. Any bank whose capital has become impaired is required under direction of the Comptroller to make up the deficiency by assessment of its shareholders and in the event of its failure to do so a receiver may be appointed to wind up its business, R. S. § 5205, 12 U. S. C. § 55.

To insure performance of these duties and as a safeguard to creditors and the public, violation of any provisions of the Act by any director or officer of the bank or by any person aiding or abetting him, is made a criminal offense, R. S. § 5209, 12 U. S. C. § 592, and in the event of such a violation, the association may be required to forfeit all its rights and privileges, R. S. § 5239, 12 U. S. C. § 93. Further, by R. S. § 5240, 12 U. S. C. §§ 481, 484, the Comptroller of the Currency is required to appoint examiners who shall examine the affairs of every bank at least twice in each calendar year with power to administer oaths and examine officers and agents of the bank under oath and who "shall make a full and detailed report" of the bank to him. By R. S. § 5211, 12 U. S. C. § 161 every association is required to make to the Comptroller of the Currency not less than three reports each year exhibiting in detail and under appropriate heads the resources and liabilities of the association, and the Comptroller is given power to call for special reports whenever, in his judgment, the same are necessary in order to obtain a full and complete knowledge of the condition of the reporting bank.

The obvious purpose of prohibiting the purchase by a bank of its own stock is to prevent the impairment of its capital resources and the consequent injury to its creditors in the event of insolvency. The provisions of the Act requiring periodic examinations and reports and the powers of the Comptroller are designed to insure prompt discovery of violations of the Act and in that event prompt remedial action by the Comptroller. These purposes would be defeated and the command of the statute nullified if a director or officer or any other by his connivance could place in the bank's portfolio his obligation good on its face, as a substitute for its stock illegally acquired, and if he remained free to set up that the obligation was, in effect, fictitious, intended only to aid in the accomplishment of the injury at which the statute is aimed.

Here, respondent, with full knowledge of the unlawful purpose to conceal the presence of the stock among the bank's assets, gave in exchange for it, first another's note and then his own, knowing that it was to be availed of as an apparently valid and lawful asset so as to forestall the remedies available under the statute for the unlawful purchase. The notes were thus carried as receivables on the books of the bank for a period of more than two years, respondent's own note or renewals of it being lodged with the bank from May 4, 1931 until the bank closed its doors in December, 1931.

If the matter were of importance we could not assume, in the absence of proof, that the bank examiners did not perform their statutory duty or that respondent's note was not as it was intended to be the effective means of concealing the impairment of the bank's capital structure and preventing resort to the remedies for it which the statute affords. But it is enough for present purposes that the respondent, after placing his note among the bank's receivables in substitution for the shares of stock, as the means of avoiding the consequences of violation of the statute, may not now take the benefit of the secret and illegal agreement that his note except for purposes of deceiving the bank examiners was to be regarded as a nullity. If respondent were free to set up the unlawful agreement as a defense and thus cast the loss from the unlawful stock purchase on the creditors of the bank in receivership, he would be enabled to defeat the purpose of the statute by taking advantage of an agreement which it condemns as unlawful. That, we think, the law does not allow.

It is a principle of the widest application that equity will not permit one to rely on his own wrongful act, as against those affected by it but who have not participated in it, to support his own asserted legal title or to defeat a remedy which except for his misconduct would not be available. See *United States* v. *Dunn*, 268 U. S. 121, 133, *Independent Coal & Coke Co.* v. *United States*, 274 U. S. 640, 648. Applied in cases like the present, the rule that the illegal agreement may not be set up to defeat the obligation of the note is sometimes denominated an equitable estoppel.[2] *Lyons* v. *Westwater*, 181 Fed. 681, 193 Fed. 817; *Federal Reserve Bank* v. *Crothers*, 289 Fed. 777; *Bohning* v. *Caldwell*, 10 F. (2d) 298 cert. den., 271 U. S. 663; *Utley* v. *Clarke, et al.*, 16 F. Supp. 435; *Iglehart* v. *Todd*, 203 Ind. 427; *Denny* v. *Fishter*, 238 Ky. 127; *Prudential Trust Co.* v. *Moore*, 245 Mass. 311; *Longley* v. *Coons*, 244 App. Div. 391, aff'd 268 N. Y. 712; *Bay Parkway Nat. Bank* v. *Shalom*, 270 N. Y. 172; see *First National Bank of Williamsburg* v. *Smith*, 200 Atl. 215 (Pa.).

In a strict and technical sense an estoppel arises only when a misrepresentation has prejudiced another who has relied upon it. For that reason courts have sometimes held that one in the position of respondent is not estopped to set up the agreement against the bank or the receiver either because it did not appear that the bank was deceived by the concealment and misrepresentation or because injury to creditors was not shown to have resulted from them, cf. *Peterson* v. *Tillinghast*, 192 Fed. 287; *Cutler* v. *Fry*, 240 Fed. 238; *First State Bank* v. *Morton*, 146 Ky. 287, 293; *Quincy Trust Co.* v. *Woodbury*, 1938 Mass. Adv. Sh. 475 *Agricultural Credit Corp.* v. *Scandia American Bank*, 184 Minn. 68. But stated more precisely, the doctrine with which we are now concerned is not strictly that of estoppel as thus defined. It is a principle which derives its force from the circumstances that respondent's act, apart from its possible injurious consequences to creditors, is itself a violation of the statute; and that the statute, read in the light of its purposes and

[2] In a number of cases it has been held that the indirect benefit of the transaction to the obligor as a creditor or shareholder of the bank is sufficient consideration to support recovery. See New v. Page, 144 Md. 606; Hurd v. Kelly, 78 N. Y. 588; State *ex rel.* Lattamer v. Hills, 94 Ohio St. 171; First National Bank v. Boxley, 129 Okla. 159; Arthus v. Brown, 91 S. C. 316. But whether the liability is sustained on this ground or that of estoppel it is apparent that the statutory policy of protection to creditors underlies both. See Brannan, Negotiable Instruments Law (6th ed.) 459.

policy, precludes resort to the very acts which it condemns, as the means of thwarting those purposes by visiting on the receiver and creditors whom he represents the burden of the bank's unlawful purchase. *Pauly* v. *O'Brien*, 69 Fed. 460; *Niblack* v. *Farley*, 286 Ill. 536; *Iglehart* v. *Todd*, *supra*, 442; *Cedar State Bank* v. *Olson*, 116 Kans. 320, 323; *Denny* v. *Fishter*, *supra*; *Parker* v. *Parker*, 287 Mich. 49; *German-American Finance Co.* v. *Merchants' & Mfgrs.' State Bank*, 177 Minn. 529; *Valley* v. *Devaney*, 49 N. D. 1107; *Bay Parkway Nat. Bank* v. *Shalom*, *supra*; *Mount Vernon Trust Co.* v. *Bergoff*, 272 N. Y. 192, 196; *Putnam* v. *Chase*, 106 Ore. 440. See *Schmid* v. *Haineff*, 115 N. J. 271. Williston on Contracts (Rev. ed.) § 1632; Zollman, Banks and Banking, § 4783.

Since it is by virtue of the statute that respondent's agreement is unlawful and that the benefit of it as a defense to the note is denied; and as the purpose of the statute is to protect creditors of the bank from the hazard of violations of the Act like the present, it is immaterial that the bank's officers were participants in the illegal transaction, *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245; *City of Marion* v. *Sneeden*, 291 U. S. 262; *Awotin* v. *Atlas Exchange National Bank*, 295 U. S. 209, or that respondent has not shown that the creditors have been deceived or specifically injured as the result of the illegal contract. Cf. *Mount Vernon Trust Co.* v. *Bergoff*, *supra*, 196. It is the evil tendency of the prohibited acts at which the statute is aimed, and its aid, in condemnation of them; and in preventing the consequences which the Act was designed to prevent, may be invoked by the receiver representing the creditors for whose benefit the statute was enacted.

Rankin v. *City National Bank*, 208 U. S. 541 and *Deitrick* v. *Standard Surety Co.*, 303 U. S. 471, on which respondent relies do not call for any different conclusion. Because of certain statements *obiter* in the opinion in the *Rankin* case, it has been taken as controlling in a number of cases resembling the present, by the Court of Appeals for the Eighth Circuit,[3] and in one case in the Sixth Circuit.[4] In cases already cited, Courts of Appeals in other circuits have reached a different conclusion. It was to resolve this

[3] Butler v. Frey, 240 Fed. 238; Yates Center National Bank v. Schaede, 240 Fed. 240; Hookway v. First National Bank, 36 F. (2d) 166; Andresen v. Kaercher, 38 F. (2d) 462; Bancroth v. Daly, 72 F. (2d) 67.

[4] Peterson v. Tillinghast, 192 Fed. 287.

cf. Butler v. Frey, 240 F. 238; Keyes v. First National Bank of Aberdeen, 20 F. 2d 678

conflict that we granted certiorari. The *Rankin* case was tried below and decided here upon the concession of counsel that the transaction involved was not illegal, 208 U. S. 547. Here it is the reach of the statute making respondent's acts illegal and affording protection from them to the creditors which governs our decision.

In the *Deitrick* case, suit was brought against a surety company, on its surety bonds, by a bank's receiver not alleged to represent any innocent creditors who were injured because of their reliance on the bond. The company's agent, as alleged and as found by the two courts below, had, to the knowledge of the bank's president, executed and delivered the bonds to the bank without consideration and without the company's knowledge or authority, all in collusion with the bank's officers in a fraudulent conspiracy to deceive the bank examiner. The company insisted that as it was the innocent victim of its agent's unauthorized acts in carrying out the conspiracy it could not be charged with responsibility for them on the theory of estoppel or of its own participation in the illegal transaction. Because of this state of the pleadings and of the record, the court found itself unable to hold that the National Banking Act imposed liability on the surety company. The decision of this Court was rested specifically, as was that of the Circuit Court of Appeals below, on the ground that the pleadings had limited the receiver's demand to the right of the bank to recover upon the bond procured by the fraud of its officers. This was shown, the Court declared, by the failure of the pleadings to allege any wrongful act for which the company was chargeable or which was injurious to creditors. It said, page 480, that the receiver "makes no suggestion of a purpose attributable to the company to mislead creditors or others, makes no allegation of damage except that sustained by the bank. He sets up no facts which could render unconscionable a denial of liability upon the bond because of the agent's fraud obviously induced by the president of the bank." We did not decide that in an action against one who, like respondent, is alleged and proved to be a participant in the illegal transaction, he can be heard to set up the defense of his illegal action to defeat the statutory policy aimed at the protection of creditors.

A point much discussed in brief and argument, upon the assumption that local law will guide our decision, see *Erie Railroad*

Co. v. *Tompkins*, 304 U. S. 64, is whether, by Massachusetts law respondent is precluded from setting up the illegality of the transaction as a defense to his note. But it is the federal statute which condemns as unlawful respondent's acts. The extent and nature of the legal consequences of this condemnation though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted, see, *Board of County Commissioners of Jackson County* v. *United States*, No. 14, decided December 18, 1939, and cases cited. We have recently held that the judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Banking Act involves decision of a federal, not a state question. *Awotin* v. *Atlas Exchange National Bank, supra.*

Reversed.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 246.—October Term, 1939.

Frederick S. Deitrick, Receiver of the Boston-Continental National Bank, Petitioner, vs. Thomas E. Greaney. } On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[February 12, 1940.]

Mr. Justice Roberts.

I think the judgment should be affirmed on the authority of *Deitrick* v. *Standard Surety & Casualty Co.*, 303 U. S. 471, decided March 28, 1938. That case followed and reaffirmed the principle announced in *Rankin* v. *City National Bank*, 208 U. S. 541, that where the receiver of a national bank sues to recover on a chose in action which was an asset of the bank, his rights rise no higher than those of the bank, even though the obligation was given to deceive creditors or the bank examiner. The doctrine of the *Rankin* case has been applied in suits by receivers of national banks for more than thirty years.[1]

Deitrick v. *Standard Surety & Casualty Company* is on all fours with the present case. There the very arguments and authorities now relied upon and cited on behalf of this petitioner were pressed without avail.

In the earlier case the same receiver brought actions at law to recover on surety bonds as assets of the bank. The facts were that the bank held worthless notes, known to its president to be such. To give a false appearance of worth to these assets he conspired with the agent of a surety company to procure surety bonds guaranteeing payment of the notes, to be used as "window dressing" and to be shown to the bank examiners if they should ask to see

[1] Peterson *v.* Tillinghast, 192 Fed. 287, 289; Skud *v.* Tillinghast, 195 Fed. 1, 5; Cutler *v.* Fry, 240 Fed. 238; Yates Center National Bank *v.* Schaede, 240 Fed. 240; Keyes *v.* First Nat. Bank, 20 F. (2d) 678, 686; Hookway *v.* First National Bank, 36 F. (2d) 166, 170; Kaercher *v.* Citizens' National Bank, 57 F. (2d) 58; Varden *v.* First Christian Church, 13 F. Supp. 159, 161; Drake *v.* Moore, 14 F. Supp. 89, 90; Seaborn *v.* Reno Nat. Bank, 20 F. Supp. 835, 838; Federal Deposit Ins. Corp. *v.* Pendleton, 29 F. Supp. 779, 781.

the collateral for the notes. The bank was afterwards examined and, as a result of the examiners' report, additional capital was subscribed. We may assume they saw the bonds. The bank remained open for a period and deposits continued to be made. Later the Comptroller determined the bank was insolvent and a receiver was appointed.

In his declaration in each action the receiver alleged his appointment, recited the execution and delivery of the surety bond to the bank and attached a copy of it. He alleged that the note or notes in question in each case was or were in default and that the surety was liable according to the terms of its bond. The surety company answered in each case setting up that no consideration was paid for the giving of the bond and that it was agreed and understood that no liability was to ensue from the execution and delivery.[2]

The District Court entered judgment for the surety company and the Circuit Court of Appeals affirmed.[3] That court, after stating that the knowledge of the president was the knowledge of the bank, held that the receiver was not an agent of the bank's creditors; that he stood in no better position than the bank; that all defenses open to the surety company as against the bank were open as against the receiver; that the suit was merely one to recover assets of the bank and that the declarations stated no cause of action other than that arising from the contract of suretyship. The court called attention to the fact that the pleadings contained no allegation that the receiver based his action on any alleged deception of, or injury to, creditors of the bank and no allegation that the receiver was suing on behalf of creditors, and held that, upon the pleadings, it was not open to the receiver to urge that he represented creditors. It refused to decide whether, on different pleadings, the receiver could recover if he alleged and proved injury resulting to creditors from the transaction.

This court affirmed the judgment on the grounds stated by the court below, citing and relying on *Rankin* v. *City National Bank*, *supra*.

The surety also pleaded that its agent had exceeded his authority in issuing the bonds, as the bank's president knew. The Circuit

[2] The surety company also filed bills seeking cancellation of each of the bonds and, in his answers, the receiver reiterated his averment that the surety company owed him the amounts stipulated in the bonds, and asked judgment for such amounts.

[3] 90 F. (2d) 862.

Court of Appeals did not pass upon this defense, since it held the receiver could not recover even if the surety company had authorized the giving of the bonds. In the opinion of this court, the surety's contention that it was not bound by its agent's unauthorized act was mentioned but was not considered or discussed as a ground of decision. The sole basis of the decision is stated as follows:

"An examination of the pleadings makes it quite clear that the Receiver undertook to set up rights acquired by the insolvent bank through duly executed contracts between it and the Surety Company. He makes no suggestion of a purpose attributable to the company to mislead creditors or others; makes no allegations of damage except that sustained by the bank. He sets up no facts which would render unconscionable a denial of liability upon the bond because of the agent's fraud obviously induced by the president of the bank. In this state of the pleadings the Receiver may not have judgment; he cannot rely on something not complained of, nor can he have damages because of supposed deceptions which the pleadings fail to suggest."

After so stating the court refers to the *Rankin* case and says: "We adhere to the doctrine there approved and regard it as decisive of the present cause."

Turning to the instant case, the facts are these: The bank had acquired shares of its own stock illegally. Such shares, so held, were inadmissible assets. The bank's president, knowing that such acquisition of its own stock was an illegal dissipation of its capital, worked out an ostensible sale of the stock for a note which it was understood was to be placed amongst the assets of the bank for the purpose of deceiving the examiners. The note was without consideration and the understanding was that it would not be collected. It was, of course, unenforceable by the bank. Subsequently deposits were made in the bank. It does not appear that the examiners saw the note. After the Comptroller had found the bank insolvent and appointed a receiver that officer filed a bill against the maker of the note, first, to collect an assessment from him as owner of the stock and, second, to recover the face amount of the note, with interest. In this bill he alleged his appointment as receiver, the acquisition of the stock by the bank, and the placing of it in straw names, the giving of the note for the purchase price of the stock and claimed "the unpaid principal amount of said note . . . together with interest thereon is due the

plaintiff . . . ." His prayers were for a decree for the amount of the assessment and for the principal amount, with interest, of the note.

The answer outlined the true transaction, asserted that the defendant's note was an accommodation note, that no consideration passed for it, and there could, therefore, be no recovery upon it.

The District Court entered a decree for the amount of the assessment and for the principal of the note with interest. The Circuit Court affirmed as to the assessment but reversed the judgment upon the note.

Here, as in the earlier case, there was no allegation that any creditors were deceived; none of any loss to the creditors resulting from the giving of the note; none that the receiver sued on behalf of creditors, and no cause of action asserted save one to recover upon the note as an asset of the bank. Here, as in the earlier case, the receiver has urged upon this court that he does represent creditors; that the public policy evidenced by the National Banking Act disables the defendant, in view of the intended deception, from asserting the lack of consideration for the note. Here, in contrast to the earlier case, the court accepts the view which was there rejected because not within the issues tendered.

In *Deitrick v. Standard Surety & Casualty Co., supra,* the receiver urged upon this court the very contentions which he again advanced in the instant case; cited in support of those contentions numerous authorities which he now cites, which are relied upon in the opinion now announced; sought to have this court adopt the proposition, now affirmed by the opinion in the present case, that the defendant was liable on the surety bond because of the public policy evidenced in the National Banking Act which, broadly speaking, estopped the surety to set up, as against the receiver, appointed pursuant to the national banking law, a wrong against that law in which it had participated.[4] His contentions were held to be unavailing in view of the cause of action he had pleaded.

In view of what has been said it is apparent that, under the guise of distinguishing the earlier case, the court in fact overrules it.

Mr. Justice McReynolds joins in this opinion.

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[4] Out of sixty-eight pages of argument in petitioner's brief thirty-nine were devoted to this contention; and every proposition now relied upon to sustain the conclusion of the court was advanced in that brief.